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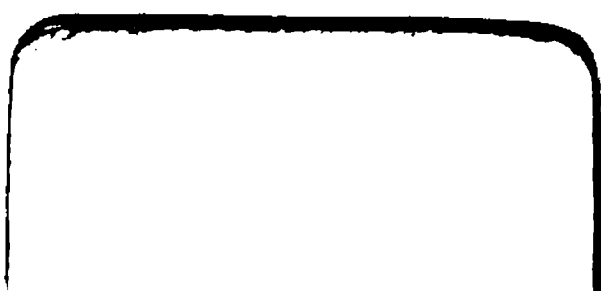
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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XLIII.

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AMERICAN STATE REPORTS.

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AMERICAN STATE REPORTS.
VOL. XLIII.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

JONES v. HOARD.

[59 ARKANSAS, 42.]

ALTERATION OF INSTRUMENTS—CONTRACT EXECUTED IN DUPLICATE.—If a lease is executed in duplicate, both the landlord and tenant retaining a copy, both copies are originals, and the fraudulent alteration by the tenant of the copy retained by him does not annul the lease, because the remaining copy is sufficient to sustain the contract between the parties.

LANDLORD AND TENANT—IMPROVEMENTS.—A tenant cannot recover for improvements erected by him on the leased premises, without the consent and against the protest of the landlord.

W. G. Whipple, for the appellant.

Ratcliffe and Fletcher, for the appellee.

44 **BATTLE, J.** This action was brought in the Pulaski chancery court by Jackson Hoard against George E. Jones to cancel a lease by which Hoard demised to Jones a certain town lot in the city of Little Rock, for three years from the first day of May, 1888, at the annual rent of twenty-four dollars, payable quarterly; and to restrain the lessee from erecting costly improvements on the demised premises.

The lease was executed in duplicate, and each party retained a counterpart. By the terms of it the lessee was permitted to build five fences and dig a well on the lot, and the lessor agreed that one-half of the rent should be appropriated to the payment of the expense of ⁴⁵ building the fences until it was paid in full. The lessor was to pay all taxes and assessments on the lot and improvements; and at the end of the term was to pay for the improvements at their

value at that time, or continue the lease at the same rate until he should pay for them.

During the term of the lease Jones, the lessee, erected two small frame houses on the lot, and was erecting a third, of brick, when this action was instituted.

The main contention in this action grows out of the clause: "The lessee is allowed to build three houses." This clause appears in the counterpart of the lease which was retained by Jones, but is not in the one held by Hoard. As originally written nothing was said in the lease about houses. Hoard insists that the clause was inserted after the execution of the lease, without his consent or knowledge, and Jones says it was inserted by him by permission of Hoard, and that the lease was thereafter acknowledged before a justice of the peace by both parties.

As to the first two houses erected by Jones there is no controversy. The parties agree that they were built by Jones under an agreement that Hoard would pay the value of the same to Jones when the possession of the lot was delivered according to the terms of the lease, and that the lease should continue in force, at the annual rent of twenty-four dollars, until such payment should be made. As to the third house Hoard says that he protested against the erection of it at the time Jones commenced to build it, but Jones insists that plaintiff requested him to build a storehouse, and, after he commenced to do so, objected to the kind of building he was putting up, but told him "if it would n't cost more than five hundred dollars, to go ahead and build it." It appears, however, that it cost eleven hundred and fifty dollars or more.

At the hearing both parties adduced evidence in support of their respective contentions. The appraisement of the buildings by persons selected by the parties, showing the value thereof to be fifteen hundred and fifty dollars, was introduced and read as evidence.

The court decreed that Hoard should pay to Jones the sum of fifteen hundred and fifty dollars for the three houses; that Jones should surrender possession on the payment to him of that amount, and of the sum of thirty-six dollars and seventy-five cents due him for fencing, less the sum of fourteen dollars due Hoard for rent of the lot from the first day of October, 1890, until May 1, 1891, the date of the expiration of the lease; and that Jones pay to Hoard for the use of the lot the sum of ten dollars a month from the 1st of May, 1891,

until the improvements are paid for, and pay all the taxes, present and future, and retain possession of the lot until the amounts due him under the decree are paid; and that each party pay one-half of the costs. Both parties have appealed.

As to the alteration of the counterpart retained by Jones, it is sufficient to say we find from the evidence that it was made by Jones without the consent or knowledge of Hoard, after the execution of the lease. But this does not affect the rights of Jones under the contract actually made by the parties, for, the lease being executed in duplicate, there were two leases, and both were originals. Although the alteration of the lease held by Jones annulled that, the lease retained by Hoard was sufficient to sustain the contract of the parties: *Lewis v. Payn*, 8 Cow. 71; 18 Am. Dec. 427; 1 Taylor on Landlord and Tenant, 8th ed., sec. 165; 1 Wood on Landlord and Tenant, 2d ed., sec. 222, and notes.

As to the third house, which was in the course of construction when this action was brought, it being erected, as we find from the evidence, without the consent of Hoard, and against his protest, Jones is entitled to nothing; and, as to the other houses, he is entitled to ⁴⁷ the payment of a sum of money equal to their value at the time when he shall deliver the possession of them to Hoard; and he is entitled to hold the lot and improvements, he paying annually twenty-four dollars, as rent, until the first two houses and the fences built and well dug on the lot shall be fully paid for by Hoard.

The decree of the chancery court is, therefore, reversed, and the cause is remanded for proceedings consistent with this opinion.

ALTERATION OF INSTRUMENTS—LEASE EXECUTED IN DUPLICATE.—Where a lease is executed in duplicate, each party receiving one, both are originals; the fraudulent alteration of one of them by the party holding it does not destroy his estate under it if the other remains intact: *Lewis v. Payn*, 8 Cow. 71; 18 Am. Dec. 427, and note.

LANDLORD AND TENANT—IMPROVEMENTS.—As to whether a tenant is entitled to reimbursement for improvements made upon the leased premises, see *Pomeroy v. Lambeth*, 1 Ired. Eq. 65; 36 Am. Dec. 33, and note; *King v. Woodruff*, 23 Conn. 56; 60 Am. Dec. 625, and note; *McQueen v. Chouteau*, 20 Mo. 222; 64 Am. Dec. 178; *Vaughan v. Cravens*, 1 Head, 108; 73 Am. Dec. 163, and note. Improvements of a permanent character made upon land, and attached thereto, without the consent of the owner, by one having no title or interest, become a part of the realty, and vest in the owner of the fee without reimbursement from him: *Williams v. Vanderbilt*, 145 Ill. 238; 36 Am. St. Rep. 486, and note.

SMITH v. STATE.

[59 ARKANSAS, 182.]

NEW TRIAL—CRIMINAL CASES—DISQUALIFICATION OF JUROR.—A person accused of crime is not entitled to a new trial on the ground that a juror had formed and expressed an opinion before he was selected, if he was accepted as such juror without examination by the accused.

HOMICIDE.—To CONSTITUTE SELF-DEFENSE it need not be made to appear that the killing was actually necessary; but to justify the killing, however, the accused, in acting upon the facts as they appear to him, must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life, or to prevent his receiving a great bodily injury. If there is no danger, and his belief of the existence thereof is imputable to negligence, he is not excused, however honest his belief may be.

ARREST FOR MISDEMEANOR — HOMICIDE TO PREVENT ESCAPE. — A peace officer may arrest one committing a misdemeanor in his presence without a warrant, and, if necessary, orally summon as many persons as he deems necessary to aid him in making the arrest. In making the arrest, or in preventing an escape after the arrest, the officer or person assisting him in obedience to a summons, when resisted by the offender, is not bound to retreat, but may use such physical force as is apparently necessary, on the one hand to effect the arrest by overcoming the resistance he encounters, or, on the other hand, to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life, or to prevent a like harm to himself.

NEW TRIAL.—AFFIDAVITS OF JURORS are not admissible to show that the jury received evidence after they retired to consider their verdict, under a statute providing that a juror cannot be examined to establish any ground for a new trial, except that the verdict was made by lot.

J. P. Clarke, attorney general, and C. T. Coleman, for the appellee.

183 BATTLE, J. Bud Smith was indicted for voluntary manslaughter, committed by killing John Boyd at Sulphur Springs, in Benton county, in October, 1892. "The evidence adduced at his trial tended to show that the deceased was drinking, and that as he came out of a saloon he gave a 'whoop.' Sharp, the town marshal, and Poindexter, his deputy, came to where he was, and asked who did the hallooing. The deceased replied that it was he, and they arrested him, and a scuffle ensued, in which the deceased succeeded 'in getting loose.'" When he had freed himself from the hands of the officers he immediately attacked the marshal, and knocked him down, and a friend, coming to his assistance, felled the deputy. As soon as the marshal

recovered from his fall he fled toward and around a crowd which was looking on, the deceased following. The defendant was then standing on the outskirts of the crowd ¹³⁴ whittling with a knife. Sharp, the marshal, in his flight, approached him and said, "I deputize you to help me arrest Boyd." The defendant made no reply, but moved a step or two toward the marshal, and stopped. The deceased ran up to them with a club or gaspipe, about twenty or twenty-four inches long, in his hand, and asked the defendant what he had to do with it, and, without waiting for a reply, struck him on the head with the club or gaspipe, and knocked him down, and, as he partially recovered, and before he was erect, struck at him again, and the defendant threw up one hand to ward off the blow, and as he did so stabbed the deceased with a pocketknife in the other. Only one wound was inflicted, and from that the deceased died on the third day. Evidence was also adduced tending to prove that the defendant had never seen the deceased before his arrest by the marshal, and that the deceased threatened to kill him when he was attacking him.

The court instructed the jury, over the objections of the defendant, as to what constitutes murder in the first and second degrees, and defined express and implied malice; and among others, gave the following instructions to the jury, over the objections of the defendant:

"In order to justify the killing on the grounds of self-defense it must appear from the evidence that the circumstances surrounding the defendant at the time were sufficient to excite the fears of a reasonable person, and that the defendant really acted under the influence of such fears, and not in a spirit of revenge. It must appear that the danger was not only impending, but was so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily injury, the killing of John Boyd was necessary. It must also appear from the evidence, in order to justify the killing, that the defendant had employed all reasonable means within his ¹³⁵ power, and consistent with his safety, to avert the necessity of taking life."

It also gave the following instruction: "The jury are instructed that if the deceased, Boyd, willfully or maliciously disturbed the peace and quiet of the town or village or neighborhood of Sulphur Springs by loud or unusual noises, or by abusive, violent, obscene, or profane language, and such

disturbance was committed in the presence of a peace officer, then such peace officer would have authority to arrest him, and summon others to assist him in making such arrest. In making an arrest for the disturbance of the peace, or other misdemeanor, or in attempting to prevent the escape of the person arrested, the officer or person acting under him can exert such physical force as is necessary, on the one hand, to effect the arrest by overcoming the resistance he encounters, or, on the other hand, to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him great bodily harm, except to save his own life, or to prevent great bodily harm to himself."

The defendant asked, and the court refused, to instruct the jury that a peace officer, or person summoned to assist him, in making an arrest of a criminal for a disturbance of the peace, or other misdemeanor, or in attempting to prevent the escape of the person arrested, is not required to retreat from resistance made to efforts to compel submission to arrest, but may use such force as is apparently necessary to compel such submission, and may if, in an effort to do so, he is assaulted by the criminal under such circumstances as lead him to believe he is in danger of losing his life or receiving a great bodily injury, repel force with force to the extent of taking the life of the criminal.

Upon the submission of the cause to them the jury found the defendant guilty of voluntary manslaughter, ¹³⁶ and assessed his punishment at two years' imprisonment in the penitentiary. He filed a motion for a new trial, and stated, as the grounds of the same, among other things, that one of the jurors had formed and expressed an opinion as to his guilt or innocence of the crime whereof he was accused, before he was selected to try him; that the court erred in giving instructions to the jury over his objections, and in refusing to give others asked for by him; and that the jury received evidence after they retired to consider of their verdict. To sustain the last ground the affidavit of one of the jurors was read, to the effect that, after the jury had retired, and had taken a ballot finding the defendant guilty, Ragsdale, a juror, detailed certain circumstances of the killing as of his own knowledge. The state read the affidavits of the twelve jurors, saying that they had found the defendant guilty of voluntary manslaughter before Ragsdale said any

thing about what he knew of the facts in the case, and, in arriving at the verdict, were governed solely by the evidence adduced at the trial and the instructions of the court.

The motion was overruled, and the defendant appealed to this court.

When a juror or talesman is placed on the stand to be accepted on a jury in a criminal case, or challenged, either party may ask him whether he has formed or expressed an opinion as to the guilt or innocence of the accused. If both fail to do so the defendant is not entitled to a new trial on the ground that the juror had formed and expressed such an opinion before he was selected. Having failed to avail himself of the means provided by law for obtaining an impartial jury, he has no right to complain of the results of his own negligence: *Casat v. State*, 40 Ark. 515.

We find nothing in the record in this case, outside of the motion for a new trial, which shows that any ¹²⁷ juror was asked whether he had any opinion about the guilt or innocence of the defendant; and that there is no error in the refusal of the court to grant a new trial because a juror had formed or expressed an opinion before he was selected to serve on the jury.

The instructions as to what constitutes murder in the first and second degrees, and express and implied malice, should not have been given, but, as the defendant was only accused and convicted of voluntary manslaughter, they were not prejudicial.

The instruction of the court upon the right of self-defense is not correct. It is true that "in ordinary cases of one person killing another in self-defense it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary." But to whom must it appear that the danger was urgent and pressing? According to reason and the weight of authority it must so appear to the defendant. To be justified, however, in acting upon the facts as they appear to him, he must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life, or to prevent his receiving a great bodily injury. He must act with due circumspection. If there was no danger, and his belief of the existence thereof be imputable to negligence, he is not excused, however honest

the belief may be. The law, says Judge Campbell, of Michigan, "does not hold men responsible for a knowledge of facts, unless their ignorance arises from fault or negligence": 1 Bishop's New Criminal Law, secs. 304, 305; 1 Wharton's Criminal Law, 9th ed., secs. 487 a-493; Kerr on Law of Homicide, sec. 169.

Professor Wharton, in his work on Criminal Law, explains what we have said as follows:

¹²⁸ "A is assaulted by B, with what appears to be a loaded pistol in his hand. A kills B, believing the pistol to be loaded, when it is not. This, it is agreed, may constitute a good case of self-defense. When we come to analyze A's belief, however, we find that it is an ordinary conclusion of inductive reasoning; a conclusion which is erroneous, because its minor premise is false. Putting this process in syllogistic form, it stands as follows:

"Whoever assaults me with a loaded pistol endangers my life.

"B assaults me with a loaded pistol, etc.

"Supposing, however, we substitute for the subject of the major premise the term 'garroter,' slightly varying the predicate, the process may be then thus stated:

"A garroter taking me by the throat is likely to do me great bodily harm.

"B is a garroter taking me by the throat, etc.

"Now, in the first case, it is enough if I honestly, though erroneously, believe that B's pistol is loaded; and, in the second case, it is enough if I honestly, though erroneously, believe that B is a garroter. In both cases the error of the conclusions is one of the apprehensive powers. I err in my apprehension; I do not see aright; or I have been misinformed; or I have not heard aright. But in each case the error for which I am to be put on trial is my error, not somebody else's error. It is no excuse to me, if I resort to self-defense, that some 'reasonable' looker-on believes the pistol to be loaded, when I know that it is unloaded. So it is no excuse to me, if I shoot down a person suddenly hustling me, that some reasonable looker-on believes the supposed assailant to be a garroter, when I know him not to be a garroter. So if I, according to my own lights, conclude the pistol to be loaded, or the assailant to be a garroter, ¹²⁹ then I am to be acquitted of malice if I act upon this belief, though I cannot be acquitted of manslaughter if I arrive at this belief negli-

gently. In other words, I cannot be convicted of murder, which involves a malicious intent, unless I have malicious intent; though I may be convicted of manslaughter if I have killed another by aiming at him a dangerous weapon without due consideration."

In the instruction given upon this subject, in this case, the court virtually told the jury that the defendant could not be justified on the ground of self-defense, unless it appeared to them from the evidence "that the danger was not only impending, but was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of John Boyd was necessary," and that he "had employed all reasonable means within his power and consistent with his safety to avert the necessity of taking life." This was error.

As to the other instructions, given or refused as before stated, it is sufficient to say: A peace officer may arrest any one committing a misdemeanor in his presence, without a warrant, and, if necessary, orally summon as many persons as he deems necessary to aid him in making the arrest. In making the arrest, or in preventing an escape after the arrest, the officer or person assisting him in obedience to a summons, when resisted by the offender, is not bound to retreat, but may use such physical force as is apparently "necessary, on the one hand, to effect the arrest by overcoming the resistance he encounters, or, on the other, to subdue the efforts of the prisoner to escape; but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life or to prevent a like harm to himself": *Thomas v. Kinkad*, 55 Ark. 502; 29 Am. St. Rep. 68.

¹⁴⁰ Affidavits of jurors are not admissible to show that the jury received evidence after they had retired to consider their verdict. Under the statutes of this state a juror cannot be examined to establish any ground for a new trial, except that the verdict was made by lot: *Mansfield's Digest*, sec. 2298; *Wilder v. State*, 29 Ark. 293.

For the error indicated the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

JURORS.—DISQUALIFICATION FOR EXPRESSION OF OPINION.: See the extended notes to *Smith v. Barnes*, 36 Am. Dec. 521, and *Commonwealth v. Brown*, 9 Am. St. Rep. 746. And see, also, *State v. Sheerin*, 12 Mont. 539; 33 Am. St. Rep. 600, and note.

HOMICIDE—SELF-DEFENSE.—Life may lawfully be taken in self-defense, but it must appear that he who takes it was in imminent danger of death or great bodily harm, and that no other way of escape from the danger was open to him: *Commonwealth v. Breyessee*, 160 Pa. St. 451; 40 Am. St. Rep. 729, and note, with the cases collected.

HOMICIDE TO PREVENT ESCAPE OF MISDEMEANANT.—Where one accused of a misdemeanor has been arrested and is fleeing, a peace officer is not justified in killing him to prevent his escape, although no other means of prevention are available: *Thomas v. Kinkead*, 55 Ark. 502; 29 Am. St. Rep. 68, and note; *Handley v. State*, 96 Ala. 48; 38 Am. St. Rep. 81, and note.

TRIAL—AFFIDAVIT OF JURORS TO IMPEACH VERDICT.—No affidavit, deposition, or other sworn statement of a juror can be received to impeach or explain a verdict, or to show on what ground it was rendered: *Weatherford v. State*, 31 Tex. Cr. Rep. 530; 37 Am. St. Rep. 828, and note; but in *Gordon v. Trevarthan*, 13 Mont. 387, 40 Am. St. Rep. 452, it was held that in Montana the affidavit of a juror may be received to attack his verdict if such affidavit shows a resort to the determination of chance.

LEAMING v. McMILLAN.

[59 ARKANSAS, 162.]

JUDGMENTS—VACATING FOR UNAVOIDABLE CASUALTY.—The serious sickness of an attorney's wife is an unavoidable casualty, excusing his non-attendance at court at the time his client's case is set for trial, and is ground for setting aside a judgment rendered at that time dismissing the action for want of prosecution, if the client has a meritorious cause of action, and has not been guilty of laches.

APPLICATION to set aside a judgment dismissing the action of Thomas Darling against McMillan and Dreyfus. Darling attached the property of the defendants, and subsequently one Waterman levied an attachment on the same property. At the term of court to which Darling's attachment was returned, and before any answer to his complaint had been filed, Waterman was made defendant to Darling's action, and a judgment of dismissal of the action for want of appearance and prosecution was rendered against him on the motion of Waterman. Darling at this time was over eighty years of age, feeble, and unable to leave his home, and had intrusted the management of the case entirely to his attorney, who, because of the serious illness of his own wife, was unable to attend court at the term when the judgment of dismissal was rendered. Neither Darling nor his attorney learned of this judgment of dismissal until the next term of court after it was rendered. Darling died before the term of court at which this application to set aside such judgment

was heard, and Leaming, his administrator, was substituted as plaintiff. The court denied the application to set aside the judgment of dismissal and to revive the action, and Leaming appealed.

Auten & Moss, for the appellants.

¹⁸⁴ HUGHES, J. It appears from the statement of the case that the failure of the plaintiff, Darling, to appear at the term of the court when the judgment of dismissal was rendered was caused by an unavoidable casualty, and that the nonattendance of himself and counsel was excusable under the circumstances.

In *Tidwell v. Witherspoon*, 18 Fla. 282, it was held that "the neglect of an attorney to prepare and file a plea, caused by his being summoned to a distant place ¹⁸⁵ on account of the serious illness of his wife, even though he might have made arrangements with another attorney to prepare it, or might have notified his client, yet did not do so because of his anxiety for his family, is not such neglect as should operate to the prejudice of his client." And in this case the judgment by default was opened up. In *McArthur v. Slauson*, 60 Wis. 293, it was held that the refusal of the trial court to open a judgment obtained in the unavoidable absence of the defendant's attorney, for the purpose of allowing a defense, was error: See, also, *Snell v. Iowa Homestead Co.*, 67 Iowa, 405; *Triplett v. Scott*, 5 Bush, 81. In *Nye v. Swan*, 42 Minn. 243, a default by reason of the sickness of an attorney was opened to allow a defense. The statute of Minnesota made this a matter of right under the circumstances.

Under the circumstances of the case at bar, there being no contention that Darling's case lacked merit, we think no laches was imputable to him, and the sickness of his attorney's wife was an unavoidable casualty, excusing his non-attendance at the court.

We therefore reverse the judgment of the circuit court, with directions to reinstate the cause, and revive it in the name of Darling's administrator.

JUDGMENTS—VACATING FOR UNAVOIDABLE CASUALTY.—That an attorney was prevented from attending court by the serious illness of his wife is sufficient reason for vacating a judgment taken against him: *Hill v. Crump*, 24 Ind. 291. Where a defendant is constructively served, but was absent from the state on account of illness that prevented his return, a default against him will be vacated: *Sage v. Matheny*, 14 Ind. 369. That a

defendant was suffering from such a severe illness that he could not present his defense will justify the court in setting aside a judgment rendered against him: *Luscomb v. Maloy*, 26 Iowa, 444. To the same effect, see *Bristor v. Galvin*, 62 Ind. 352. See Freeman on Judgments, 3d ed., sec. 115. For a thorough discussion of the subject of vacating judgments on the ground of "mistake, surprise, or excusable neglect," see the extended note to *Burnham v. Hays*, 58 Am. Dec. 393; and the note to *Williams v. Weacott*, 14 Am. St. Rep. 296.

HOLLIS v. STATE.

[59 ARKANSAS, 211.]

HOMESTEADS.—WIFE IS ENTITLED TO CLAIM a homestead for herself and children out of the property of her husband after he has become a fugitive from justice, if she and her children continue to remain on and occupy the land.

HOMESTEADS—LIABILITY FOR COSTS.—Homesteads are not subject to sale under execution to satisfy a judgment for a fine or costs in a criminal prosecution.

Crump & Watkins, for the appellant.

J. P. Clarke, attorney general, for the appellee.

¶²¹² RIDDICK, J. The facts in this case are as follows: Appellant, R. J. Hollis, a married man, the head of a family, and the owner of a homestead, was convicted of murder in the second degree in the Marion circuit court, and a judgment rendered against him for imprisonment and the costs of prosecution. After his conviction he broke jail and escaped. An execution on said judgment for costs, amounting to about eight hundred dollars, was issued against him. He was a fugitive from justice, his whereabouts unknown, but his family continued to remain and occupy the homestead. In the absence of her husband his wife filed a schedule, claiming the homestead and some personal property as exempt from sale under execution. The clerk of the court issued a *supersedeas* staying the execution as to the homestead. On motion of the prosecuting attorney this *supersedeas* was quashed by the court, and the homestead ¶²¹³ ordered sold. From this order an appeal was taken.

The question for this court to determine is whether the homestead is subject to sale under such circumstances. In other words, can the wife claim a homestead for herself and children after her husband has become a fugitive from justice, and is the homestead exempt from the lien of the state for costs in a criminal prosecution?

In the case of *Harbison v. Vaughan*, 42 Ark. 541, this court said that "the protection of the family from dependence and want is the object of all homestead laws"; that, "apart from his family, the debtor is entitled to no special consideration." As the protection of the family is the object of the homestead law, so it has been held that desertion of the family by the husband, still leaving the family occupying the homestead, is not an abandonment of the homestead: *Moore v. Dunning*, 29 Ill. 130; 81 Am. Dec. 301, and cases cited in note to same. This ruling is supported by sound reason; for to refuse the protection of the homestead to the wife and children when the husband has abandoned them would be to deprive them of it at a time when they needed it most, and would defeat the beneficent purpose of the homestead law. In this state, under the act of 1887, the wife can claim the homestead as exempt when the husband neglects or refuses to do so.

As to the question whether the homestead is subject to the lien of the state for costs in a criminal prosecution we think there is little room for doubt. The constitution expressly declares that it shall not be subject to the lien of any judgment or decree of any court, or to sale under execution or other process thereon, except such as may be rendered for the purchase money or for specific liens, laborers' or mechanics' liens for improving the same, or for taxes, or against executors, administrators, guardians, receivers, attorneys for moneys ²¹⁴ collected by them, and other trustees of an express trust for moneys due from them in their fiduciary capacity": Const. 1874, art. 9, sec. 3.

The lien of the state for costs in a criminal prosecution is not a specific lien, nor does it come within the meaning of either of the other exceptions named. Homestead laws are intended for the protection of the families of those who are poor or unfortunate, and, in cases of this kind, there are no reasons why the state should be exempt from their operation. The supreme court of Illinois, in holding that the homestead could not be sold to satisfy a judgment against the husband for a fine and the costs in a criminal prosecution, said "that the object of these laws was to furnish a shelter for the wife and children which could not be taken away or lost by the act of the husband alone," and "that the state must submit to the same exemptions of a defendant's property that it imposes upon its citizens": *Loomis v. Gerson*, 62 Ill. 11.

The attorney general, with becoming candor, has furnished

us with this and other authorities, which conclusively show that a homestead is not subject to sale under an execution to satisfy a judgment for a fine or costs in a criminal prosecution: *State v. Williford*, 36 Ark. 155; 38 Am. Rep. 34; *Massie v. Enyart*, 33 Ark. 688; *Fink v. O'Neil*, 106 U. S. 272; *Commonwealth v. Lay*, 12 Bush, 283; 23 Am. Rep. 718; Smyth on Homesteads and Exemptions, sec. 185; Thompson on Homesteads, sec. 385.

We therefore conclude that the circuit court erred in quashing the *supersedeas* issued by the clerk, and its judgment is therefore reversed, and the motion to quash dismissed.

HOMESTEADS—WHAT DOES NOT CONSTITUTE ABANDONMENT.—Desertion by the husband leaving the family still occupying the homestead is not an abandonment of the homestead. It still continues to be the home and residence of the husband, as well as of his family, at least until it is proved that he has acquired a residence elsewhere: *Moore v. Dunning*, 29 Ill. 120; 81 Am. Dec. 301, and note, with the cases collected.

TEXARKANA GAS AND ELECTRIC LIGHT CO. v. ORR.

[59 ARKANSAS, 215.]

APPELLATE PRACTICE—OBJECTION FIRST RAISED ON APPEAL.—An objection that plaintiff should have sued as administrator, instead of merely denominating himself the administrator of deceased, and also that he failed to show his official character by a proper proof of his letters of administration, cannot be raised for the first time in the appellate court, but should be taken advantage of by way of motion in the lower court.

APPELLATE PRACTICE—AMENDMENT TO CONFORM TO PROOF.—If an action by an administrator for the death of his intestate, caused by negligence, is erroneously brought for the benefit of the estate, instead of for the widow and next of kin, the appellate court must, in the absence of demurrer, treat the case as it was treated by the parties in the court below, as being a claim by the administrator for injury to the deceased in his lifetime, and consider the complaint as amended to correspond with the proof.

NEGLECT—LIVE ELECTRIC WIRES IN STREET—DAMAGES.—Evidence that an electric light company knew at night that its wires were grounded, that it nevertheless kept its power up, and that the next day a pedestrian was killed by coming in contact with a live wire in the street, is sufficient to establish gross negligence, and justify a verdict and judgment for punitive as well as actual damages.

NEGLECT—CONTRIBUTORY—WHEN QUESTION FOR JURY.—Whether one killed by a live electric wire which had become grounded during a storm, and which he undertook to move out of the way, was guilty of

contributory negligence in so doing, is for the jury to decide, from a consideration of the object he had in view, his knowledge or ignorance of all the elements of danger connected therewith, and previous warnings to him of the danger of handling grounded wires.

ACTION to recover for death caused by negligence. The Texarkana Gas and Electric Light Company was a corporation operating electric lamps and wires in the city of Texarkana for the purpose of furnishing lights to its inhabitants. During the night of August 22, 1891, a severe storm raged in the city, and a portion of the wires of the company became broken and grounded about midnight. Information that the wires were down reached the power-house of the company about two o'clock A. M., but it continued to keep power on, and to send the electricity through its system of wires. Some hours after daylight, about six o'clock A. M., Ed Wallace was crossing one of the streets of the city, and caught hold of a dead wire lying in the street. He was informed by one Cole of the danger of meddling with the wires, and that a hog had been seriously shocked a short time before by coming in contact with a live wire. Notwithstanding this warning he continued to drag the wire across the street until ordered by a policeman to put it down. In apparent obedience to this order he grasped the wire with both hands, tossing it back and forth, preparatory to throwing it aside. While so engaged the wire in his hands crossed a live wire, thus bringing him in contact with the electricity, and he fell dead almost immediately. From the evidence it appeared that the deceased was a boy, not yet arrived at the age of manhood; and Chief Justice Bunn said, in writing a statement of the facts in the case, that the deceased "appears to have been of that indiscreet age which is between the irresponsibility of youth and the full responsibility of manhood. He appears to have been at an age when it might fairly be left to the jury to say how far he should be held responsible in any given state of case." After verdict and judgment against the electric light company for both actual and punitive damages it appealed.

Scott & Jones, for the appellant.

J. D. Cook, for the appellee.

231 BUNN, C. J. The objections that plaintiff should have sued as administrator, instead of merely denominating himself the administrator of deceased, and also that he failed to

show his official character by a proper proof of his letters of administration, should have been made and insisted on, by way of motion, at an earlier stage of the proceedings, and are not available now.

At common law no action lay for the death of a person produced by the negligence or wrongful act of another. Now, by statute (Mansfield's Digest, sections 5225 and 5226), an action lies for damages growing out of the death, at the instance of the administrator, for the benefit of the widow and next of kin, and, in the absence of an administrator, at the instance of the heirs at law, for the same purpose. The suit authorized by these two sections is not for the benefit of the estate of deceased. ²²² The proceeds do not go into the hands of the legal representative, to be distributed to creditors and heirs, and others entitled under the statute of administration, but to be distributed to the widow and next of kin "in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate"; and the damages are to be such as the jury, in each case, "may deem a fair and just compensation, with reference to pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person."

Again, a suit for damages to person or property, which might be brought by the injured person, did not, at common law, survive to his legal representative, and if it had been instituted by the deceased in his lifetime it abated at his death. Now, by statute, however (Mansfield's Digest, section 5223), an "action may be maintained against the wrongdoers, and such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, or, after his death (that of the wrongdoer), against his executor or administrator, in the same manner and with like effect in all respects as actions founded on contracts."

In construing these several statutes together (for they bear some relation to one another) this court, in the case of *Davis v. Railway Co.*, 53 Ark. 117, said: "The right of action given by the latter statute (Lord Campbell's act, sections 5225 and 5226) to the personal representative of one whose death has been caused by the default of another, is created by the statute, and is not a continuation of the right of action which the deceased had in his lifetime. . . . The right which accrued to the deceased survives to his administrator by virtue of the former statute (Mansfield's Digest, section 5223); the newly

created right (by section 5225) results from, and accrues on, the death of ²²³ the injured party. Both actions are prosecuted in the name of the personal representative, where there is one, and may proceed *pari passu*, without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries. One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery of which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrongs done to the decedent, but is for the pecuniary loss to the [widow and] next of kin, occasioned by the death alone. The death is the end of the period in the one case, and the beginning in the other. In the one case the administrator sues, as legal representative of the estate, for what belonged to the deceased; in the other, he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them."

The suit at bar must be regarded as an action by the plaintiff as administrator for the benefit of the estate of the deceased; and, viewing it as such, the complaint, which lays its damages for the death of the deceased, would be bad on demurrer; for damages for the death of decedent, when recovered, are no part of the assets of the estate, to be distributed to creditors and so forth. But as no demurrer was interposed, and since the manner of eliciting the testimony, the language of the instructions, the argument of counsel, and the verdict of the jury and judgment of the court all go to show that the parties, the jury, and the court all treated the claim of the plaintiff as one for the injury to deceased in his lifetime, that is to say, for the pain and suffering he endured from the moment he was stricken until the moment of his death, which was legitimate, ²²⁴ we will also treat the case in that way, and consider the complaint as amended to correspond with the proof.

The court is of the opinion that the evidence of negligence on the part of the defendant company, and its servants and employees, is sufficient to authorize the verdict of the jury, and that the evidence as to pain and suffering is sufficient to justify the verdict for actual damages; and a majority is of the opinion that there is evidence of wanton disregard of the rights and safety of others on the part of the defendant's

employees, upon which the jury may have assessed punitive damages, as they did.

As to the defense of contributory negligence, a majority of the court is of the opinion that, whether or not the conduct of deceased in handling the broken wires was careless, somewhat depends upon the object he had in so doing, and also upon his knowledge or ignorance of all the elements of danger connected therewith, and that the jury may have found from the evidence that he was not guilty of contributory negligence, notwithstanding the warnings that were given him.

Thus, having in view the prerogative of the jury, we do not feel justified in disturbing their verdict.

The instructions of the court, as given, when taken all together, we think fairly and substantially declared the law to the jury.

The judgment is therefore affirmed.

NEGLIGENCE—LIVE ELECTRIC WIRES IN STREETS.—Electric corporations permitted to use the public streets for their own purposes must be required to use the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note, with the cases collected.

NEGLIGENCE—CONTRIBUTORY—WHEN A QUESTION FOR JURY.—When considerable doubt exists as to whether or not the plaintiff is guilty of contributory negligence, that question should be submitted to the jury for its determination: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403, and note. When contributory negligence is relied on as a defense, unless evidence thereof is so plain and convincing as to leave no doubt in the minds of reasonable men, it is error for the court to peremptorily instruct for the defendant: *Nesbitt v. Greenville*, 69 Miss. 22; 30 Am. St. Rep. 521, and note, with the cases collected.

WOLF v. STATE.

[59 ARKANSAS, 297.]

INTOXICATING LIQUORS—ELECTIONS—CONSTRUCTION OF STATUTE.—Under a statute making the giving away of intoxicating liquor on an election day a misdemeanor it is no defense that the giving away of such liquor on such day has no connection with or reference to the election then being held.

EVIDENCE.—JUDICIAL NOTICE is taken of the fact that wine is an intoxicating liquor.

A. S. McKennon, for the appellant.

J. P. Clarke, attorney general, and *C. T. Coleman*, for the appellee.

297 HUGHES, J. The appellant was convicted of giving away intoxicating liquor in Logan county, in this state, **298** on the day of a general election for state officers, and appealed to this court. The liquor given away was wine. He contends that the court improperly refused an instruction which he asked, and committed error in the three instructions given. These instructions are as follows: 1. "The jury are instructed that if the defendant, in Logan county, Arkansas, on election day mentioned in the indictment, within one year next before the finding the indictment, gave or sold to witness Weeks any quantity of intoxicating liquors, you will find him guilty, and assess his punishment at a fine," etc; 2. "If defendant conducted witness to the place, and assisted him in procuring intoxicating liquors in any quantity, defendant is as guilty as if he sold or gave it from his own hand." The defendant objected to the giving to the jury each of said instructions, but the court overruled his objections, and the defendant at the time excepted.

The defendant asked the court to instruct the jury as follows: "If you find from the evidence that defendant was not a dealer in liquors, and was in no way connected with the sale of, or traffic in, liquors of any kind, and that the wine given by him to the witness had no connection with, or reference to, the election then being held, you will find the defendant not guilty." The court refused this instruction, and the defendant excepted.

After argument of counsel the jury retired to consider their verdict at about 2:30 P. M., and during the afternoon were called into court twice, and interrogated by the court why they could not agree upon a verdict, and they replied that they differed as to whether the wine given to witness by defendant was intoxicating or not, and the court instructed them that such was a question of fact which they alone should decide; and kept them together until adjourning time, when they, under instructions, were permitted to disperse until **299** 8 o'clock next morning, when they were called into court, and the court then further instructed them as follows: 3. "Wine is an intoxicating liquor within the meaning of the statute, and its sale or gift on election day is prohibited." Defendant objected to the giving of this instruction to the jury, but the court overruled the objection, and the defendant at the time excepted.

Section 1850 of Mansfield's Digest makes the giving away

of any intoxicating liquors on the day of any election, or the succeeding night, in any county, city, town, or township in which said election may be held, punishable by fine of not less than two hundred dollars, or imprisonment for not less than six months, or both. It matters not that the giving away of the intoxicating liquor has no reference to the election. The statute makes no exception.

The court takes judicial knowledge of the fact that wine is an intoxicating liquor. It is a matter of common knowledge: Black on Intoxicating Liquor, sec. 5; 11 Am. & Eng. Ency. of Law, 582; *Jones v. Surprise*, 64 N. H. 243; *State v. Packer*, 80 N. C. 439; *State v. Williamson*, 21 Mo. 496.

The judgment is affirmed.

EVIDENCE.—JUDICIAL NOTICE AS TO WHAT ARE INTOXICATING LIQUORS: See the notes to *Snider v. State*, 12 Am. St. Rep. 353, and *Lanfear v. Mestier*, 89 Am. Dec. 694.

REYNOLDS v. SHAVER.

[59 ARKANSAS, 299.]

DEEDS—QUITCLAIM—LIABILITY UNDER.—A grantor conveying by deed of bargain and sale all his right, title, claim, and interest in and to a tract of land is not responsible for defects in the title beyond the covenants in his deed.

DEEDS OF ALL TITLE AND INTEREST—EFFECT OF COVENANT OF WARRANTY.—If a deed purports in terms to convey only the right, title, and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty is limited to that right or interest, and cannot be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance.

SUIT in equity to recover damages for breach of covenant in a deed. A. G. Kelsey died, leaving a wife and minor daughter. D. Reynolds then married Kelsey's widow, and became the administrator of his estate, including the land in controversy, which was the homestead of Kelsey at the time of his death, and continued to be the homestead of Mrs. Kelsey and her daughter at the time that Reynolds married the former. As such administrator Reynolds conveyed the land in dispute to J. M. Shaver, who, in conjunction with his wife, subsequently conveyed the same land to Reynolds by a deed purporting to bargain and sale "all their right, title, claim, and interest in and to" the said land, describing it, "to have and to hold forever unto the said Dennis W. Reynolds, his

heirs and assigns. And we, the said James M. Shaver and Caroline Shaver, do, for ourselves, and our heirs and assigns, warrant and defend the same unto the said Dennis W. Reynolds." After the death of Mrs. Reynolds her daughter, before mentioned, brought ejectment against Reynolds for the land in controversy, and recovered judgment against him for a portion thereof. Reynolds then brought this suit against the heirs of James M. and Caroline Shaver, for an alleged breach of covenant of warranty contained in the deed from them to him. The trial court dismissed his suit for want of equity, and he appealed.

J. C. Hawthorne, for the appellant.

P. H. Crenshaw, for the appellees.

³⁰² HUGHES, J. The contention of the appellant is that the covenants in the deed of Shaver and wife, Caroline, to him apply to the land described in the deed, and not to whatever "right, title, claim, and interest" the appellees' ancestor may have had at the time of the execution of the deed, which was all that the deed, in terms of the granting clause, purports to convey. The warranty is: "And we, the said James Shaver and Caroline Shaver, do, for ourselves and our heirs and assigns, warrant and defend the same unto the said Dennis W. Reynolds." It appears from the language in the granting part of the deed that Shaver and wife intended to convey only their "right, title, claim, and interest" in the land, and that they intended only to "warrant and defend the same." This is the legal import of their warranty, that is, that they would warrant and defend such "right, title, claim, and interest" as they had in the land at the date of their conveyance, which was all they had conveyed. The conclusion that such was their intention seems apparent from the language of the conveyance, and is strengthened by the facts that Reynolds, as administrator of the estate of ³⁰³ Kelsey, had conveyed this land to Shaver while it was a homestead, and could not legally be sold by the administrator. The conveyance of Shaver and wife to Reynolds was, therefore, nothing more than a quitclaim deed.

In *Van Rensselaer v. Kearney*, 11 How. 322, it is said: "The general principle is admitted that a grantor, conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not re-

sponsible for the goodness of the title beyond the covenants in his deed": *Patton v. Taylor*, 7 How. 159; 2 Sugden on Vendors, c. 12, sec. 2, p. 421; 2 Kent's Commentaries, 473, and other cases cited. "Where a deed purports to convey only the right, title, and interest of the grantor, the scope of the covenant of warranty may be limited by the subject matter of the conveyance": 2 Devlin on Deeds, sec. 931, and cases cited. Tiedeman on Real Property, section 858, says: "If a deed purports to convey in terms the right, title, and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty will be limited to that right or interest, and will not be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance."

Affirmed.

DEEDS—QUITCLAIM—WHAT INTEREST CONVEYED BY.—A quitclaim deed vests in the purchaser only what the grantor himself could claim: *Allison v. Thomas*, 72 Cal. 562; 1 Am. St. Rep. 89, and note. A quitclaim deed only purports to release whatever interest the grantor possesses at the time: *San Francisco v. Lawton*, 18 Cal. 465; 79 Am. Dec. 187, and note; *Johnson v. Williams*, 37 Kan. 179; 1 Am. St. Rep. 243, and note; in *Bramlett v. Roberts*, 68 Miss. 325. See, also, the notes to *Merrill v. Hutchinson*, 23 Am. St. Rep. 718, and *Thorn v. Newsom*, 53 Am. Rep. 749.

DEEDS—QUITCLAIM—WARRANTY.—The covenant of warranty runs with the land, and the vendee, through a sheriff's deed or a quitclaim, may recover upon the covenant: *Saunders v. Flaniken*, 77 Tex. 662.

HOUSTON, CENTRAL ARKANSAS, AND NORTHERN RAILWAY COMPANY v. BOLLING.

[59 ARKANSAS, 895.]

RAILROAD COMPANIES—LIABILITY TO PERSON RIDING ON HANDCAR.—A young child cannot recover from a railway company for injuries received through the negligence of the company's employees while the child was riding on a handcar, if such employees had been expressly forbidden by the rules of the company and otherwise to permit persons not employees to ride on such cars, and there was no custom to permit persons to so ride, shown to have been known to, or acquiesced in by, the officers of the company.

ACTION by Falls Bolling against the Houston, Central Arkansas, and Northern Railway Company, to recover damages for personal injury. Mike O'Connor was the foreman of a section crew employed by said railway company. Among

the machinery furnished this crew to enable them to perform their work was a handcar furnished them for the express purpose of transporting the section laborers with their tools and materials to and from the several places on the line of the road within the section where needed, and for no other purpose. The rules and regulations of the company expressly forbade the section foreman or any of the section-men to allow any one to ride on the handcar except the laborers on the section. They were also forbidden to use such car except in their work, and of these rules and regulations O'Connor had express notice. On March 29, 1892, after the section crew had quit work, for the day, they used the handcar for the purpose of transporting a couple of ladies from the section-house to a place on the road where they desired to go. Falls Bolling, the plaintiff, a child about four years old, asked to be taken on the trip. Mike O'Connor was much attached to the child and asked his mother to allow him to go. Mrs. Bolling consented, and the boy was taken on the trip. The party arrived at the destination of the ladies in safety. On the return trip, however, O'Connor noticed that the boy was becoming sleepy, and moved him to a place on the car which he thought to be safe. Shortly thereafter the boy fell asleep and in some unexplainable manner got his hand caught in a cogwheel and crushed. On the trial he recovered a judgment against the company for five thousand dollars, and it appealed.

Dodge & Johnson, for the appellant.

Wells & Williamson, and Jones & McCain, for the appellee.

402 HUGHES, J. In *Flower v. Pennsylvania R. R. Co.*, 69 Pa. St. 210, 8 Am. Rep. 251, the facts were as follows: "A train of defendant's coming into the city, the engine, tender, and one car were detached from the remainder, and run, under the charge of the fireman in the engineer's place, to a water-station belonging to the defendants. At the station the fireman asked a boy ten years old, standing there, to turn on the water; while he was climbing the tender to put in the hose, the remainder of the train came down with their ordinary force, struck the car attached to the engine, the jar threw the boy under the wheels, and he was killed." In action by the parents for his death it was held that, it not being in the scope of the engineer's or fireman's employment to ask any one to come on the engine, the defendants were

not liable; that the boy, in climbing on the tender at the request of the fireman, did not come within the protection of the defendants, and they therefore owed no duty to him. The appeal in this case was before Justices Agnew, Sharswood and Williams. Judge Agnew delivered the opinion of the court. He said: "Whether the boy could be treated as ⁴⁰³ a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence, where there is clear negligence on the part of the company. The true point of this case is that, in climbing the side of the tender or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. . . . Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but cannot supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but cannot create rights or duties which have no other foundation."

In *Eaton v. Delaware etc. R. R. Co.*, 57 N. Y. 382, 15 Am. Rep. 513, it is said that railroad companies have the right to make a complete separation between their freight and passenger business. When this is done, the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the natural and apparent divisions of the business. "In the great transactions of commercial corporations convenience requires a subdivision of their operations among many different agents. Each of these may have a distinct employment, and become a general agent in his particular department, with no powers beyond it."

In *Stone v. Hills*, 45 Conn. 47, 29 Am. Rep. 635, it is said: "The rule is that for all acts done by a servant in obedience to the express orders or directions of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express authority conferred upon him, considering the nature of the services required, the instructions ⁴⁰⁴ given, and the circumstances under which the act is done, the master is responsible; for acts which are not in these conditions the servant alone is responsible."

In *Storey v. Ashton*, L. R. 4 Q. B. 476, Cockburn, C. J. said: "We cannot adopt the view of Erskine, J., in *Sleath v. Wilson*, 9 Car. & P. 607, that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. Thus, it will be seen that, in the absence of express orders to do an act, in order to render the master liable, the act must not only be one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment": Wood's Law of Master and Servant, 546.

In the case at bar the section foreman was not only not authorized, expressly or by implication, to permit persons to ride on the handcar, but had been expressly forbidden by the rules of the company and otherwise to permit it, and there was no custom to permit persons to ride on the handcar shown to have been known to, or acquiesced in by, the officers of the railroad company. "In order that the corporation should be made responsible by reason of such a custom it was necessary to show that it was actually known to the officials who conducted its business, or that it was so general and of such long continuance that it must be fairly inferred that it was known and assented to by them": *Powers v. Boston etc. R. R.*, 153 Mass. 191. Such is not shown to have been the case here. The court deems it needless to set out or discuss the instructions. The court is therefore of the opinion that there is a total failure in ⁴⁰⁵ this case of evidence to show any liability upon the part of the railroad company. Wherefore the judgment is reversed and the cause is dismissed.

Wood, J., being disqualified, did not participate in the determination of this cause.

RAILROADS—LIABILITY TO PERSONS INJURED WHILE RIDING ON HANDCARS.—In the absence of proof that a railway company is accustomed to carry passengers upon handcars one who is injured while thus riding has no cause of action against the company, although thus invited to ride by the section foreman: *Hoar v. Maine Cent. R. R. Co.*, 70 Me. 65; 35 Am. Rep. 299. A railroad company must exercise ordinary and reasonable care for the safety of a passenger lawfully on its handcar: *International etc. Ry. Co. v. Prince*, 77 Tex. 560; 19 Am. St. Rep. 795, and especially note. See, also, *International etc. R. R. Co. v. Cock*, 68 Tex. 713; 2 Am. St. Rep. 521.

WOOD v. WOOD.

[59 ARKANSAS, 441.]

APPELLATE PRACTICE—REVIEW OF DECREE.—A bill to review a decree of divorce, on the ground of alleged errors of law apparent on the face of the record, may be filed without first obtaining leave of court; but an erroneous order of court to strike the bill from its files should not be reversed, unless prejudicial to the appellant.

PRACTICE ON BILL OF REVIEW.—In an attack upon a decree by a bill of review for errors of law the court cannot examine the evidence to see whether the decree is based upon a correct finding of facts. In such case it is the sole duty of the court to inquire whether the record, exclusive of the evidence, contains any substantial error of law pointed out by the bill.

MARRIAGE AND DIVORCE—DIVORCE ON AMENDED COMPLAINT—REVIEW OF DECREE.—If a plaintiff in an action for divorce who has not acquired the statutory residence within the state before bringing suit acquires such residence before filing an amended complaint setting up a distinct and separate cause for divorce the amended complaint is equivalent to bringing a new action, and a decree of divorce rendered therein is regular so far as the question of residence is concerned, and cannot be set aside as erroneous on a bill of review.

MARRIAGE AND DIVORCE—ALIMONY IN GROSS.—An allowance of alimony in gross by consent of the parties at the time the decree of divorce is rendered is not error.

DOWER—EFFECT OF DIVORCE.—A decree of divorce from the bonds of matrimony bars the wife's claim of dower.

MARRIAGE AND DIVORCE—ALIMONY—CONCLUSIVENESS OF DECREE.—A wife who, in her action for divorce, fails to show by her complaint in what her husband's estate consists, or that it is within the jurisdiction of the court, cannot, after obtaining a decree of absolute divorce, with a large sum as alimony, have the decree vacated or amended on a bill of review, on the ground that the court failed to set apart to her one-third of her husband's estate as by statute provided.

Martin & Murphy, for the appellant.

Rose, Hemingway & Rose, and J. M. Moore, for the appellee.

444 BATTLE, J. The chancery court erred in striking from its files appellant's bill of review for the reason that it was filed without leave first had and obtained. It was brought to procure an examination and reversal of a decree made on a bill for divorce on account of alleged errors of law apparent on the face of the record. It is not necessary to obtain leave of the court before a bill of this kind can be filed: *Perry v. Phelps*, 17 Ves. 178; *Story's Equity Pleading*, secs. 404, 405; *Mitford's Equity Pleading*, 84. In *Jacks v. Adair*, 83 Ark. 173, and *Webster v. Diamond*, 36 Ark. 538, this court held that a bill of review founded on newly discovered evidence

cannot be lawfully filed without leave of the court first obtained; ⁴⁴⁵ but this rule does not apply to bills of review for errors of law apparent on the face of the decree.

The order to strike the bill from the files of the court should not be reversed, notwithstanding it was erroneous, unless it was prejudicial to the appellant; and it was not if the bill fails to show that she was entitled to the relief asked for therein, and should be affirmed: *Woodall v. Moore*, 55 Ark. 22; *Denson v. Denson*, 33 Miss. 560; *Bleight v. M'Ilvoy*, 4 T. B. Mon. 142. Was it prejudicial?

Appellant assigns in her complaint three errors of law in the decree of divorce: 1. The appellant had not resided in this state for a period of one year before she commenced the action in which the decree of divorce was rendered; 2. The allowance of alimony was too small and inadequate; and 3. The alimony should not have been given her in bar of dower in the estate of appellee. The prayer of the bill was that the decree be so modified as to allow her reasonable alimony, and a divorce from bed and board instead of from the bonds of matrimony.

In an examination of the errors assigned we are confined to the pleadings, proceedings, and decree, as set out in the complaint. In an attack upon a decree by a bill of review for errors of law a court cannot look into the evidence to see whether the decree is based upon a correct finding of the facts. That is the proper office of a court of competent jurisdiction upon an appeal. But, assuming that the facts upon which the decree rests have been properly found, it is the sole duty of a court to inquire whether the record, exclusive of the evidence, contains any substantial error of law pointed out by the bill of review: *Story's Equity Pleading*, sec. 407; *Buffington v. Harvey*, 95 U. S. 99.

1. Before any person can be entitled to a divorce, under our statute, he or she must allege and prove, in ⁴⁴⁶ addition to a legal cause of divorce, a residence in this state for one year next before the commencement of the action. The appellant failed to comply with this statutory prerequisite in the beginning of her action as first instituted. She first became a resident of this state on the 17th of April, 1888, and brought suit for a divorce on the 26th of June next following; and was not, therefore, entitled to a decree for divorce in the action as originally brought. But she amended her complaint by adding an entirely new and distinct cause of

divorce; of which the cause on which her action was originally founded formed no part, and by stating that she had been a resident of this state for more than two years next before the filing of the amendment, and by asking for a divorce from the bonds of matrimony, and for alimony. This amendment was filed in June, 1891. Appellee answered it, and denied the allegations as to the grounds of divorce. Depositions were taken to show the residence of the appellant in this state for the one year before the filing of the amendment and the new cause of divorce. Upon this evidence she obtained the decree which she now seeks to set aside by bill of review.

The filing of the amendment setting up an entirely separate and distinct cause of divorce, and the answer to it of appellee, were equivalent to, and not distinguishable from, the beginning of a new suit. In answering, the appellee entered his appearance, and waived summons. The same result was reached as would have been accomplished had a new and original complaint been filed. In that case the appellee could have entered his appearance, as he did, and waived summons, and the same end would have been obtained as was reached by the filing of the amendment. The legal effect of the two proceedings is the same. When a new cause of action is introduced by amendment a *lis pendens* is not created as to the subject matter of the amendment, and ⁴⁴⁷ the statute of limitation does not cease to run until the filing of the amendment: *Curtis v. Hitchcock*, 10 Paige, 400; *Holmes v. Trout*, 7 Pet. 214; *Sicard v. Davis*, 6 Pet. 124; *Wilkes v. Elliot*, 5 Cranch C. C. 611. Such has been held to be the effect of an amendment setting up a new cause of divorce in Kentucky. In *Logan v. Logan*, 2 B. Mon. 148, it was held that "though an original bill for alimony and divorce may be prematurely filed, yet, if grounds for alimony occur before the hearing, and the facts are set out in an amended bill, and not answered, the court may give the appropriate decree for the complainant." "And so, in *McCrocklin v. McCrocklin*, 2 B. Mon. 370, the same court held that, though the time of abandonment may not have authorized any decree when the original bill was filed, yet if, before the filing of an amended bill, the abandonment has been sufficiently long to authorize a decree of divorce and for alimony, it may be decreed."

2. As to the sufficiency of the alimony decreed to the ap-

pellant, no error of law appears upon the record. That is a fact which appears only in the evidence. Upon this point the decree says: "In the matter of alimony, the same having been heard by the court on proof and arguments of solicitors, and the parties consenting that alimony may be awarded in a gross sum, and the court being well and sufficiently advised in the premises, it is ordered and adjudged that out of the estate of the said defendant, Henry Wood, the plaintiff, Mary J. Wood, be, and she is hereby, allowed the sum of thirty-three thousand dollars by way of alimony to be paid to her by the said Henry Wood (or to her solicitors of record, Caruth & Erb), together with the costs accrued in this cause." This is conclusive in this proceeding as to the sufficiency of the alimony, it being a matter which was determined by the court by hearing the evidence. If it was inadequate the remedy of the appellant was by appeal from the decree ~~448~~ by which it was allowed: *Bauman v. Bauman*, 18 Ark. 320; 68 Am. Dec. 171.

In allowing alimony in a gross sum the court departed from the course usually pursued in such matters, but this was done by consent. She was represented by solicitors, who were acting within the apparent scope of their authority. She has no right to repudiate her acts of record done by them, but she must abide by them, and hold her solicitors responsible, if they were derelict in their duties, or unfaithful to her injury. In rendering a decree in accordance with consent of parties, given by their respective solicitors, no error of law was committed by the court: *Coster v. Clarke*, 3 Edw. Ch. 405; *Price v. Notrebe*, 17 Ark. 56; *Beck v. Bellamy*, 93 N. C. 129; *Shattuck v. Bill*, 142 Mass. 56; *Brockley v. Brockley*, 122 Pa. St. 1, 6.

3. In allowing alimony the court decreed that it should be a "bar of all the plaintiff's right of dower in the estate of the said Henry Wood," her former husband. She insists that, the divorce not having been granted on account of her misconduct, the court erred in barring her dotal rights. But this is not true, unless she could have retained her right to dower after her divorce from the bonds of matrimony. She could not at common law. To entitle a party to dower she must be the wife at the death of the husband. A divorce from the bonds of matrimony barred the claim of dower: *Frampton v. Stephens*, L. R. 21 Ch. Div. 164; *McCraney v. McCraney*, 5 Iowa, 241; 68 Am. Dec. 702; *Gleason v. Emer-*

son, 51 N. H. 405; *Barrett v. Failing*, 111 U. S. 525; *Day v. West*, 2 Edw. Ch. 596; *Reynolds v. Reynolds*, 24 Wend. 196; *Wait v. Wait*, 4 N. Y. 95; 1 Coke on Littleton, c. 5, sec. 36, p. 32 a; 3 Blackstone, 130; 4 Kent's Commentaries, 54; 2 Bishop on Marriage, Divorce, and Separation, sec. 1631.

But section 2578 of Mansfield's Digest provides: "In case of divorce dissolving the marriage contract for ⁴⁴⁹ the misconduct of the wife she shall not be endowed." This is a peculiar statute. Without undertaking to declare the rights of a divorced wife the legislature declared by this section in what event she shall not be endowed. It is a copy of a New York statute without the enactment of the statutes of the state from which it was borrowed, which explained and gave it vitality and effect in that state.

In *Reynolds v. Reynolds*, 24 Wend. 193, the origin and effect of this statute in New York is explained as follows: "By the statute, Westm. second (13 Ed. I.), c. 34, it was enacted that 'if a wife willingly leave her husband, and go away, and continue with her *advouterer*, she shall be barred forever of action to demand her dower that she ought to have of her husband's lands, if she be convicted thereupon, except that her husband willingly and without coercion of the church reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action': 2 Inst. 433. This statute was, in substance, re-enacted in this state in 1787: 1 Greenleaf, p. 294, sec. 7; and it remained in force down to the revision of the laws in 1830. . . . In 1830 the act of 1787 was repealed, and, after declaring that a widow shall be entitled to dower, a new provision was made in the following words: 'In case of divorce dissolving the marriage contract, for the misconduct of the wife, she shall not be endowed:' 1 Rev. Stats. 741, sec. 8. Under this statute the adultery is not enough. It must be followed by a divorce dissolving the marriage contract. This brought us back to the common law, as it stood before the statute of 13 Edward I., for, as we have already seen, adultery did not work a forfeiture at common law. And as to a divorce *a vinculo*, that always put an end to the claim of dower; for, although it was not necessary that the seisin of the husband should continue during the coverture, it was necessary that the marriage should continue ⁴⁵⁰ until the death of the husband: Coke on Littleton, 32 a; 2 Blackstone's Commentaries, 130; 2 Kent's Commentaries, 52 c, and p. 54. The statute bar for the mere act of adultery,

which had existed for more than five centuries and a half, was blotted out by the repeal of the act of 1787—the British statutes not being in force in this state; and the eighth section of the act of 1830 has added nothing to the law as it would have stood had the legislature stopped with a simple repeal of the act of 1787.”

In *Wait v. Wait*, 4 N. Y. 95, the court overlooking *Day v. West*, 2 Edw. Ch. 592, and *Reynolds v. Reynolds*, 24 Wend. 193, “held that a judgment dissolving a valid marriage for the adultery of the husband did not cut off the wife’s inchoate right to dower in lands of which he was at the date of the judgment, or theretofore had been, seised.” In speaking of the decree dissolving the marriage in that case the court said: “The statutory divorce is limited in its operation, and only affects the rights and obligations of the parties to the extent declared by statute. . . . It is true that the decree is that the marriage be dissolved, and that each party be freed from the obligations thereof. This dissolution and release, however, is not absolute. The wife, when the husband is the guilty party, is still entitled to her support, and the obligation of marriage still rests upon the husband, so far as to render it unlawful for him again to marry. When the wife is the guilty party the marriage still continues in force, so far as to give the husband a title to her property, and to render it unlawful for her to marry. As a further penalty for her offense the legislature has declared, that when the wife is convicted of adultery, she shall not be entitled to dower in her husband’s real estate.”

Holding that a decree of divorce had no other effect than that declared by the statute, and finding that the dissolution of marriage by the decree was not absolute, ⁴⁵¹ but that the obligation of marriage, according to the statutes of New York, still rested upon the husband, so far as to render it unlawful for him again to marry, the court rested its decision in *Wait v. Wait*, 4 N. Y. 95, on the ground that the section which provided that, “in case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed,” by denying a wife’s right to dower when divorced for adultery, by fair implication saved it when a divorce was granted for the adultery of the husband. This decision, even under the peculiar laws of New York, has been questioned: *Moore v. Hegeman*, 27 Hun, 70; affirmed 92

N. Y. 521; 44 Am. Rep. 408; *Price v. Price*, 124 N. Y. 599; 2 Bishop on Marriage, Divorce, and Separation, sec. 1635.

But there is no statute in this state limiting the dissolution of the marital ties to either party. Under the statutes the courts can impose on the husband the obligation to support the divorced wife by way of alimony, but in a divorce *a vinculo* the dissolution of the marriage is absolute. The common law in this respect is unrepealed. Here no *quasi* marital relation or condition exists, after a divorce from the bonds of matrimony has been granted, upon which the right to dower can attach. Under the statutes of this state the widow only is entitled to dower. It is true that the language of section 2578 of Mansfield's Digest indicates the opinion that the wife would be entitled to dower if the divorce should be granted on account of the misconduct of the husband, but, as said by Chief Justice Marshall in *Postmaster General v. Early*, 12 Wheat. 148, "a mistaken opinion of the legislature concerning the law does not make law": Endlich on Statutes, sec. 372.

At the time appellant was granted a divorce a statute of this state, enacted on the 2d of March, 1891, provided that a wife who has been granted a divorce from the bonds of matrimony "shall be entitled ⁴⁵³ to one-third of her husband's personal property absolutely, and one-third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, for her life, unless the same shall have been relinquished by her in legal form," and the final order or judgment of divorce "shall designate the specific property, both real and personal, to which such wife is entitled." It is contended by appellant that, if the filing of the amendment to her complaint was the beginning of a new action, the act of March 2d was in force at its commencement, and the one-third part of the estate of her divorced husband should have been set apart to her according to its terms. But she did not assign the failure to do so as an error in her bill of review, and seek to have it corrected. On the contrary she sought to have the decree of divorce from the bonds of matrimony set aside, and thereby to surrender the right to one-third of her husband's estate, if she was entitled to it, and for a divorce from bed and board and for alimony against appellee. She, therefore, has no right to complain in this court that she did not recover that which she neither asked for nor desired.

Appellant did not undertake to show, in her original or amended bill for divorce, that she was entitled to the benefits of the act of March 2, 1891. Her original bill was filed before it was passed, and it was not amended thereafter in that respect. For the purpose of showing that she was entitled to considerable alimony she alleged in the original bill that the defendant was not worth less than two hundred thousand dollars, but did not say in what his estate consisted, or that it was within the jurisdiction of the court. No information is given to show that the court had the jurisdiction, by reason of the quality and location of the property, to set apart to her one-third of it under the act. It might have been real estate situate ⁴⁵³ in another state. Nothing appears in the record, outside of the evidence, to show that the court committed an error of law in failing to divide the estate of the husband in accordance with the act.

Decree affirmed.

BILLS OF REVIEW—NECESSITY FOR LEAVE OF COURT TO FILE.—Leave of court is necessary before filing a bill of review, or a bill in the nature of a bill of review: *Simpson v. Watts*, 6 Rich. Eq. 364; 62 Am. Dec. 392, and note.

BILLS OF REVIEW—WHAT REVIEWED ON.—To entitle one to bring a bill of review error must appear on the face of the decree or pleadings, and the evidence at large cannot be gone into: *Seguin v. Maverick*, 24 Tex. 526; 76 Am. Dec. 117, and note. A reversal of a decree will not be justified by a mere difference of opinion as to the weight of testimony: *Tracey v. Sacket*, 1 Ohio St. 54; 59 Am. Dec. 610, and note. A bill of review lies to correct errors appearing in the body of the decree without further examination of matters of fact: *James v. Fisk*, 9 Smedes & M. 144; 47 Am. Dec. 111, and note. See, also, the extended notes to *Brewer v. Bowman*, 20 Am. Dec. 164, and *Duggen v. McGruder*, 12 Am. Dec. 532.

MARRIAGE AND DIVORCE—ALLOWANCE OF ALIMONY IN GROSS: See the extended note to *Methvin v. Methvin*, 60 Am. Dec. 668.

DOWER.—A DECREE OF DIVORCE BARS ALL CLAIM TO DOWER: *Carr v. Carr*, 92 Ky. 552; 36 Am. St. Rep. 614, and note.

DIVORCE—RES JUDICATA.—A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights which might have been settled by such decree: *Roe v. Roe*, 52 Kan. 724; 39 Am. St. Rep. 367, and note.

WORTHEN v. GRIFFITH.

[59 ARKANSAS, 532.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—WITHHOLDING ASSETS.—The withdrawal by a director of a corporation of a portion of its assets for his own use at a time when the corporation is hopelessly insolvent, and in contemplation of an assignment for the benefit of creditors, does not of itself render a subsequent partial assignment void, if the assignment does not tend in any way to promote or cover up the acts of such director in reference to the withdrawal of such assets.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES.—An assignment by an insolvent corporation for the benefit of creditors is not rendered void from the fact that on the day the assignment was instituted the corporation confessed judgment in favor of *bona fide* creditors preferred in the assignment, and then entered its appearance in an action by the assignee and such creditors, with consent that the assignee should be appointed receiver of the assigned property, so that it might be sold under order of court on terms prohibited by the statute regulating assignments.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY CORPORATION—PREFERENCES.—A corporation having the right to prefer one or more of its creditors may do so by assignment, mortgage, or judgment, or by a combination of these methods, so long as no fraud is perpetrated under the pretense of securing the debt.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY CORPORATION.—An insolvent corporation has a right to make an assignment in trust for the benefit of its creditors, and may exercise such right to the same extent and in the same manner as a natural person, unless restricted by its charter or some statutory provision.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY CORPORATION—ASSETS AS TRUST FUND.—In those states where an insolvent corporation may make preferences among its creditors by assignment the rule that the property of the corporation is a trust fund in the hands of its directors as a specific lien or direct trust does not prevail, and it is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of the corporation, that such assets constitute a trust fund for its creditors.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY CORPORATION—PREFERENCE TO DIRECTOR.—A corporation having the right to prefer its creditor by assignment may thus prefer a just debt due from it to one of its directors.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY CORPORATIONS—PREFERENCE TO DIRECTORS.—An assignment for the benefit of creditors by an insolvent corporation with preferences is not void from the fact that the officers or directors are liable as indorsers on notes constituting part of the indebtedness of the corporation preferred by the assignment.

ACTION to set aside an assignment for the benefit of creditors as fraudulent and void. The F. P. Gray Dry Goods Company, an insolvent corporation, duly executed a deed of assignment to Joseph Griffith for the benefit of its creditors, by which it conveyed to him its entire stock of merchandise,

fixtures, and other assets, to pay: 1. The cost of administering the trust; 2. To pay W. B. Worthen & Co. about two thousand three hundred dollars, and Wolf & Bro. about two thousand three hundred dollars, and the Gazette Publishing Company about four hundred dollars; 3. To pay the residue of the proceeds of the assigned property to the remaining creditors of the incorporation in equal proportions without preferences. At the time of the execution of this assignment the stockholders and directors of the corporation were F. P. Gray, J. A. Gray, and L. L. Boone, the first-named being president. The assignee at once gave bond and took possession of the assigned property, and the corporation duly confessed judgments in favor of Worthen & Co. and Wolf & Bro. for the amounts due them, respectively, and executions duly issued at once. On the day that the assignment was executed the judgments confessed, and the executions issued Worthen & Co. and Wolf & Bro. commenced an action in equity against Griffith and the assignor, reciting the foregoing proceedings, the perishable nature of the property assigned, and praying that Griffith, as assignee, be invested with the power of a receiver to take charge of the assigned assets, and under the order of the court distribute the proceeds as provided in the assignment, and for other proper relief. Subsequently Burnham & Co. and other creditors of the corporation filed intervening petitions reciting that all the foregoing transactions and proceedings were fraudulent and void on the ground of the insolvency of the corporation, and that they were a part of a general scheme to cover up the assets of the corporation. "That, for a long time previous to said confession of judgment and assignment, the officers of said company had been fraudulently disposing of its property, and secreting and withdrawing it from the assets of the corporation, and appropriating it to their own use; that Worthen & Co. held the notes of the dry goods company for a portion of the indebtedness claimed to be due them, and that said F. P. Gray and James A. Gray, two directors, were individual indorsers on said notes, and that, for other debts not so indorsed, F. P. Gray had deposited property with said Worthen as collateral security; that, in order to relieve said individual liability of said F. P. and James A. Gray, said dry goods company had purchased large amounts of goods in order that the same might be included in the assignment, so as to pay off the debts of said preferred creditors;

that both James A. and F. P. Gray attended the meeting of the board of directors which authorized said assignment and confession of judgment, and voted for the same." That they had brought suit against the insolvent corporation in question, and had caused attachments to issue, but that said attachments had not been levied, because the property of the corporation was in the hands of a receiver. "They prayed that the assignment, judgment, and application for a receiver be declared void, and that a sufficient amount of the proceeds of the sale by the receiver be paid over to the intervenors to satisfy their claims, and for other relief." On the conclusion of the trial in the court below the court decided that the assignment was fraudulent and void, and ordered the proceeds of the assets in the hands of the receiver distributed, first, to pay the claims of the intervening creditors who had filed attachments, the remainder of the funds to be distributed to the remaining creditors in equal proportions, including the preferred creditors under the assignment, whose debts were valid and justly due. The preferred creditors and the receiver appealed.

Rose, Hemingway & Rose and J. Erb, for the appellants.

Sanders & Cockrill and C. B. Moore and Jones & McCain, for the appellees.

569 RIDDICK, J. The assignment in question in this case is assailed on several grounds. We will first consider the question whether the evidence is sufficient to support the contention that F. P. Gray, president of the F. P. Gray Dry Goods Company, while contemplating an assignment by said company, purchased large quantities of goods, with a view to include them in said assignment, so that the preferred debts might be paid in full, and thus relieve himself of liability on his indorsement. Outside of the fact that the dry goods company was in an extremely insolvent condition at the time of the assignment, and that Gray, who was himself insolvent, and of no worth, financially, was an indorser on some of its preferred notes, the only evidence directly bearing on this point was the testimony of witnesses Boone and Lambert. Boone was the secretary of the company. He testified that he had a conversation with Gray when he started for New York in March before the assignment was made; that Gray said that he intended to buy very few goods;

that afterward, while in New York, he bought about twenty-two thousand dollars' worth of goods, including a bill he had ordered from Kansas City just before he started for New York. When asked, on cross-examination, whether the amount bought was materially larger than witness expected him to ⁵⁷⁰ buy, he replied: "I am not a judge of that, but I am satisfied in my own mind, from what I heard him and the clerks say, that he did not need near the goods." On the other hand, Lambert, who was a manager of two of the departments of the company's store, testified that it was the custom of Gray to ask the heads of the different departments what goods were needed, before going on to purchase them; that, before leaving for New York, in March previous to the assignment, Gray had, as usual, asked him to state the amount of goods needed for his departments. In the conversation Gray instructed witness "to make the order as small as possible, and not to order any goods unless they were absolutely needed." He further testified that Gray only purchased about half the goods he requested him to purchase. Gray returned from New York the latter part of March, and the assignment was made on the 12th of May following—about a month and a half after his return.

We do not think this evidence sufficient to show that Gray contemplated the assignment at the time the goods were purchased, or that he made the purchase with the intention not to pay for the goods. But, if such an intention on the part of Gray was shown, it is doubtful if any one, except the creditors from whom such goods were purchased, could complain, and there is nothing in the pleadings or the proof to show us from whom goods were purchased at that time.

The evidence does show that when the company became hopelessly insolvent, and it was apparent that a failure was inevitable, Gray, a few days before the assignment was executed, and with a view of making the assignment in question, withdrew about seven hundred dollars of cash from the assets of the company, and appropriated it to his own use. Did this make the assignment void? It was said in the case of *Hill v. Woodberry*, 49 Fed. Rep. 138, 4 U. S. App. 72, a case involving the validity of an assignment ⁵⁷¹ made in this state, that "a fraudulent disposition of property invalidates a subsequent assignment for the benefit of creditors only when the deed of assignment is part of a scheme to defraud creditors, and the provisions of the deed are calcu-

lated to promote that object." The assignment executed by the dry goods company was only a partial assignment. It did not pretend to convey to the assignee all the assets of the company, and the funds appropriated by Gray were not included in the assets conveyed by it. We do not see that the assignment tended in any way to promote or cover up the acts of Gray in reference to the withdrawal of such assets, and we hold that its validity was not affected by such acts: *Excelsior Mfg. Co. v. Owens*, 58 Ark. 561.

It is further contended that the confession of judgment, the deed of assignment, and the application for a receiver constituted the assignment in fact, and that they were in violation of the statute regulating assignments for the benefit of creditors, and were therefore void. Of the five cases cited by counsel to support this contention, three of them (*White v. Cotzhausen*, 129 U.S. 329; *Preston v. Spaulding*, 120 Ill. 208, and *Hahn v. Salmon*, 20 Fed. Rep. 801) are cases which arose under statutes forbidding preferences in assignments by insolvent debtors. These cases were controlled by the rule, which seems to be well established, that, where such statutes exist, an insolvent debtor, contemplating a general assignment, will not be allowed to evade the statute by executing a mortgage or confessing a judgment in favor of one or more of his creditors whom he wishes to prefer. Such a preference in a general assignment being in those states forbidden by the letter of the law it is properly held that preferences by a mortgage or judgment made in contemplation of an assignment are equally against its spirit, and void, for, to quote from the opinion in one of those cases, "courts are not to be ⁵⁷² misled by mere devices or baffled by mere forms." In the case of *Richmond v. Mississippi Mills*, 52 Ark. 30, the court only announced the general rule that courts will look, not only at the name, but at the substance, of the instrument, and the intention of the parties, in order to determine what the instrument is. In *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477, the other case cited by counsel, the deed of assignment contained a provision that the trustees should pay the grantor for his support, out of the proceeds of the property assigned, a sum not exceeding two thousand dollars per annum. Afterward the assignor, being apprehensive lest the assignment should be held void on account of this reservation in his favor, confessed a judgment in favor of the trustees named in the assignment

for the benefit of the preferred creditors. It was held that an insolvent debtor can make no assignment of any part of his property in trust for himself, and that, if the security for the benefit of creditors contain such a provision, or be intended to come in aid of another security containing such a provision, it is void. The assignment was therefore declared void because of this reservation in favor of the grantor, and the judgment was also held to be void because the court found that the object and intention of it was to carry out and sustain an illegal assignment.

These cases can have but small weight here, for the assignment before us does not reserve any benefit to the grantor, and it does not contravene the policy of our law, for we have no statute forbidding preferences. In this state the debtor, having the absolute right to prefer one or more of his creditors, may do so by assignment, mortgage, or judgment, or in any other legitimate way. If, at or about the time he executes an assignment preferring certain creditors, he also confesses judgment in their favor, the court may properly scan such acts of an insolvent debtor closely, to see that no fraud is ⁵⁷² perpetrated under the pretense of securing a debt. But when it is found that the judgment is based on a valid debt, which is also preferred in an assignment executed in due form, and otherwise legal, then, to declare them void, we are forced to hold that although, standing alone, each would be valid, yet, taken together, both would be bad. To such a conclusion we cannot come.

But it is said that, at the time the assignment was executed and the judgments confessed, the parties interested intended to apply to the chancery court for the appointment of a receiver that the goods assigned might be sold on terms prohibited by the statute, and that this intention made the assignment in law fraudulent and void. The question whether the chancellor erred in appointing a receiver, and in taking jurisdiction over the assets assigned, is not before us in this case. The appellees appeared, and, by proper petitions, became parties to the action, and, without any demurrer or objection to the jurisdiction of the court, submitted the case on its merits, and it is not necessary now to determine the question of the regularity of the appointment of the receiver. But if it be conceded that the appointment of a receiver was, under the circumstances, unauthorized, still we cannot adopt the view that the intention to bring an unau-

thorized suit is such a fraud as will invalidate an assignment in other respects valid. We do not think that an intention, based on a mistaken view of the law, should be followed by such severe consequences.

This brings us to the question whether the assignment was rendered invalid by reason of the fact that F. P. and James A. Gray, two of the directors of the dry goods company, were interested as indorsers on some of the notes to Worthen & Co., which constituted a portion of the indebtedness preferred by the assignment. It will be necessary, therefore, to consider the question of the powers of corporations to make assignments, and to prefer ⁵⁷⁴ creditors, under the laws of this state. In the old case of *Ex parte Conway*, 4 Ark. 304, this court first considered the question whether a corporation has, unless restrained by its charter or some statute, the same power of disposing of its property by assignment as an individual under like circumstances has, or, in other words, quoting the language of the court, "whether the law places natural and artificial persons upon the same footing in regard to such assignments"? The conclusion reached by the court in that case was that a corporation has the same power of disposing of its property by assignment, and of preferring its creditors, that a natural person has, under like circumstances. In the later case of *Ringo v. Biscoe*, 13 Ark. 575, the same question was considered by the court, and the doctrine that an insolvent corporation has the same right to execute an assignment and make preferences among its *bona fide* creditors that a natural person has, under like circumstances, was reaffirmed in an opinion by Chief Justice Watkins. That a corporation in failing circumstances has the right to make an assignment and prefer one or more of its creditors has, in this state, never been doubted or questioned since the determination of those cases. But, outside of this state, the rule seems to be well established, and Mr. Burrill, in his work on Assignments, quotes with approval the language of Chancellor Walworth in *De Ruyter v. Trustees of St. Peter's Church*, 3 Barb. Ch. 119, that "it appears to be settled, by a weight of authority which is irresistible, that a corporation has the right to make an assignment in trust for its creditors; and may exercise that right to the same extent, and in the same manner, as a natural person, unless restricted by its charter or some statutory provision." And he concludes the same section by saying that, "apart from statutory provi-

sions, no distinction exists between an individual and a corporation in regard to the exercise of ⁵⁷⁵ the power to make preferences": Burrill on Assignments, 6th ed., sec. 45, pp. 64, 65, where the authorities are collated.

If it be true that an insolvent corporation may prefer its creditors, and if it be also true that the debt due Worthen & Co. was an honest and *bona fide* debt, which the dry goods company had the right to contract, and that the indorsement by the directors was legitimate, then, upon what logical or reasonable ground can we conclude that the dry goods company could not prefer this debt in making the assignment?

There are quite a number of cases decided by different courts that hold that the assets of an insolvent corporation constitute a trust fund, and that the directors will be treated as trustees holding this fund for the benefit of the creditors of the corporation. It is apparent that where this rule is adopted in its full extent no preferences to any creditor can be made by an insolvent corporation, and so it has been held. The supreme court of Wisconsin, after laying down the rule that the directors and officers of an insolvent corporation are trustees for the creditors, says: "The directors are then trustees of all the property of the corporation for all its creditors, and an equal distribution must be made, and no preference to any one of the creditors, and much less to the directors or trustees as such": *Haywood v. Lincoln Lumber Co.*, 64 Wis. 646. This seems to be the logical and consistent result of what is known as the "trust-fund doctrine." To assert that the directors of an insolvent corporation hold its property as trustees, that it is a trust fund in their hands for the benefit of the creditors of the corporation, and at the same time to admit that they may prefer one creditor or one class of creditors, to the exclusion of others equally deserving, would seem to be both illogical and inconsistent. If the directors hold the assets of the corporation as trustees ⁵⁷⁶ for the creditors, then each creditor has a right to his share in the proceeds of the assets of the corporation, and the directors cannot defeat this right. So soon as we admit that the director may prefer one creditor or class of creditors, and thus defeat the right of another creditor to his share in the assets, we come irresistibly, to the conclusion that the directors are not trustees for the creditors, nor the assets a trust fund, within the ordinary meaning of such terms, for the two positions are inconsistent and contradictory.

As the rule is firmly established in this state that a corporation, even though insolvent, may make preferences among its creditors, it is evident that it cannot be said that the property of a corporation in this state is a trust fund in the hands of its directors, in the strict and technical sense of such words. There may be a qualified meaning in which, at times, the assets of a corporation may properly be termed a trust fund, and this may be well illustrated by reference to certain opinions of the supreme court of the United States, in which the question has been considered. In the case of *Graham v. Railroad Co.*, 102 U. S. 148, Mr. Justice Bradley, after referring to the contention that the corporation was a mere trustee holding its property for the benefit of its stockholders and creditors, said: "We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same." The learned judge then proceeds to say that, when a corporation becomes insolvent, a court of equity may, at the instance of the proper parties, take charge of its assets, and administer them as a trust fund for the benefit of its stockholders and creditors. "The court," he says, "will then make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his." In other words, as we understand that opinion, until a court, through its officers, takes charge of the property of the corporation, it has, even though insolvent, as complete control thereof as an individual would have over his property under like circumstances. In the late case of *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 385, Mr. Justice Brewer, reviewing the cases on this question, illustrates the sense in which the term "trust fund" has been used by the court in speaking of the assets of a corporation. "The same idea of equitable lien and trust," he says, "exists to some extent in the case of partnership property. Whenever, a partnership becoming insolvent, a court of equity takes possession of its property, it recognizes the fact that in equity the partnership creditors have a right to payment out of those funds in preference to

individual creditors, as well as superior to any claims of the partners themselves. And the partnership property is, therefore, sometimes said, not inaptly, to be held in trust for the partnership creditors, or that they have an equitable lien on such property. Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or direct trust." It is only in this limited and qualified sense that the assets of an insolvent corporation may in this state be properly said to be a trust fund for its creditors, for our ⁵⁷⁸ decisions that such a corporation may make preferences among its creditors is inconsistent with the idea of any specific lien or direct trust.

But it is contended that the funds of an insolvent corporation are in the hands of the directors to be disbursed on their unbiased and impartial judgment, and that, when personal interest or individual gain is an element subserved through their preference, it should be set aside as being in contravention of sound equitable principles. To support this contention counsel cite, among other cases, the well-considered case of *Mallory v. Mallory-Wheeler Co.*, 61 Conn. 131. In that case the directors of a corporation undertook to use their official position for their own benefit, and to increase their salary, to the injury of the interests of the corporation. The familiar rule that no one acting in a fiduciary capacity shall be permitted to make use of that relation for his own benefit, at the expense of the interests of his principal, was invoked by the corporation, and applied by the court. There can be no doubt that the rule was properly applied in that case, for the directors are agents, and, to a certain extent, trustees of the corporation. They will not be allowed to enter into engagements in which they have a personal interest conflicting with the interests of their principal, whose interests they are bound to protect. The rule is of wide application, and applies, as was held in that case, to agents, partners, guardians, executors, and to trustees generally, as well as to the directors and managing officers of corporations. If personal engagements hostile to the interest of their principals are entered into by persons holding such fiduciary relations they are not, in law, absolutely void, but voidable at the election of their principals. We do not see how that rule can apply

In this case, for the party complaining here is not the corporation, but certain creditors of the ⁵⁷⁹ corporation. The directors of a corporation are neither trustees nor agents of the creditors, and they do not occupy a fiduciary relation toward them, and therefore the rule does not apply.

Although there are expressions in many of the cases cited by counsel that seem to support the contention that, even when an insolvent corporation may make preferences, the directors of such corporation must be free from personal bias in disbursing its assets and making such preferences, yet we do not believe that such a rule has any sound reason to rest upon. The very fact that preferences are made shows always that the party making them is biased more or less toward the person in whose favor they are made. As long as preferences are allowed to be made by insolvent debtors they will be dictated more or less by the personal bias of the person making them. The individual debtor, when insolvent and forced to make an assignment, generally prefers his friends, and often members of his own family. The home creditor and neighbor is preferred at the expense of the non-resident one, perhaps equally deserving. So, when this dry goods company came to make an assignment, it is not strange that, in making preferences, it should favor the home creditors. The contention that the estate of an insolvent debtor should be disbursed by some one acting without bias or personal interest would apply almost as well to the case of an assignment by an insolvent individual or partnership, as to that of a corporation, and, if adopted, would result in forbidding all preferences in assignments by insolvent debtors, a result that must be productive of much good, but it is one that the courts might leave to the wisdom of the legislature to accomplish; for, to quote the language of Judge Caldwell, in *Gould v. Little Rock etc. Ry. Co.*, 52 Fed. Rep. 684, the right to make preferences "is too firmly imbedded in our system of jurisprudence to be overthrown by judicial decision, and it can ⁵⁸⁰ no more be overthrown by the courts in its application to corporations than to individuals": *Gould v. Little Rock etc. Ry. Co.*, 52 Fed. Rep. 684. That was a case that arose in this state, and was controlled by the laws of this state, and, after an examination of the authorities, the court held that an insolvent corporation of this state may prefer its creditors, whether they be officers of the corporation or strangers. "The doctrine established by the best-consid-

ered cases, and by the supreme court of the United States," says Judge Caldwell, in his opinion in that case, "is that the mere fact that creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a *bona fide* loan of money previously made to such corporation, and used by it in conducting its legitimate business." The same question came in a recent case before the United States circuit court of appeals for the sixth circuit, and the same conclusion was reached. "It may be conceded," said Judge Taft, who delivered the opinion of the court, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing, beyond question, that he had a *bona fide* debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a *bona fide* creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends": *Brown v. Grand Rapids etc. Co.*, 58 Fed. Rep. 286. The following cases sustain this position: *Buell v. Buckingham*, 16 Iowa, 284; 85 Am. Dec. 516; *Garrett v. Burlington Plow Co.*, 70 Iowa, 697; 59 Am. Rep. 461; *Bank of Montreal v. Potts Salt and Lumber Co.*, 90 Mich. 345; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; ⁵⁸¹ *Planters' Bank v. Whittle*, 78 Va. 739; *Hallam v. Indianola Hotel Co.*, 56 Iowa, 179; *Smith v. Skeary*, 47 Conn. 47; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Whitwell v. Warner*, 20 Vt. 425; *Duncomb v. New York etc. R. R. Co.*, 84 N. Y. 190.

The supreme court of Iowa, in *Garrett v. Burlington Plow Co.*, 70 Iowa, 697, 59 Am. Rep. 461, after discussing at some length the question whether an insolvent corporation can prefer a debt due one of its directors, and deciding that it may do so, then considers the exact question involved in this case, that is, whether such a corporation may prefer a note to a person having no connection with the corporation, but upon which note a director is indorser, and disposes of it in the following words: "The note held by the savings bank presents a different and less difficult question. It was not given to a director or member of the corporation. Rand and other directors are indorsers or guarantors of the note. We

know of no principle of law which will compel the bank to proceed against the indorsers or guarantors, and surrender the property it holds to other creditors."

A corporation will not, any more than an individual, be allowed to convey its property to defraud its creditors, but in the case at bar the evidence is conclusive that the debt due Worthen & Co. was an honest and *bona fide* debt for a large sum of money, which they in good faith loaned the dry goods company. They had no interest in or connection with the dry goods company, either as stockholders or directors. They had a perfect right to make the loan, and it was entirely legitimate for a director to indorse the notes as a personal guaranty that the money should be repaid. As the proof shows that F. P. Gray, who was the indorser on two of the notes for three thousand dollars each, was insolvent, and that James A. Gray, who was the indorser on another one of the notes for five thousand dollars, had but little property in this state, it is plain that, in ⁵⁸² making the loan, Worthen & Co. relied mainly on the faith and credit of the dry goods company. In other words, they expected to be paid by the dry goods company and not by the indorsers.

While there is not wanting eminent authority to support the decree of the learned chancellor in this case, yet, after a consideration of the above authorities, and also of the cases cited by counsel for appellee, we have reached the conclusion that, the dry goods company having the right to make preferences, and Worthen & Co. having advanced it in good faith over twenty thousand dollars to be used in its business, that the fact that two of the directors were indorsers on notes for a portion of this sum did not, under the laws of this state, render the assignment preferring the debt due Worthen & Co. invalid.

Had we reached a different conclusion it is doubtful if the equitable principle of equality could in this case have been applied in the distribution of the proceeds of the assets of the insolvent corporation. Such a conclusion, under the former adjudications of this court, would probably only have resulted in giving priority to a different set of creditors, not more meritorious or deserving than those preferred by the assignment. Many eminent text-writers have severely condemned a state of law that admits of preferences by insolvent corporations, but their reproaches, in the language of counsel, "must fall on the legislative, not on the judicial.

branch of the government." Our own legislature is no longer subject to such criticism, for the act of 1893 forbids such preferences by insolvent corporations, and this opinion, so far as it deals with the question of preferences by such corporations, is only declaratory of what the law was before the passage of that act.

⁵⁸³ The decree of the chancellor is therefore reversed, and the case remanded, with an order to distribute the proceeds of the assets of the dry goods company in accordance with the priorities named in the assignment.

Mr. Justice BATTLE dissented.

CORPORATIONS—POWER TO MAKE ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.—An insolvent corporation can make a general assignment to an assignee in trust for the benefit of its creditors: *Vanderpoel v. Gorman*, 140 N. Y. 563; 37 Am. St. Rep. 601, and note.

CORPORATIONS—INSOLVENCY—RIGHT TO MAKE PREFERENCES.—An insolvent corporation may prefer one creditor to another: *Warfield v. Marshall County Canning Co.*, 72 Iowa, 666; 2 Am. St. Rep. 263, and note; *Rollins v. Shaver Wagon etc. Co.*, 80 Iowa, 380; 20 Am. St. Rep. 427, and note. *Contra*, see *Rouse v. Merchants' Nat. Bank*, 46 Ohio St. 493; 15 Am. St. Rep. 644, and note.

CORPORATIONS—INSOLVENCY—RIGHT TO PREFER DIRECTORS.—The directors of an insolvent corporation cannot secure themselves a preference: *Hill v. Pioneer Lumber Co.*, 113 N. C. 173; 37 Am. St. Rep. 621, and note. See, also, the extended notes to *Beach v. Miller*, 17 Am. St. Rep. 298, and *Garrett v. Burlington Plow Co.*, 59 Am. Rep. 466.

CORPORATIONS—INSOLVENCY.—Assets of an insolvent corporation are not a trust fund, and creditors may secure preferences therein by obtaining liens by judgment or otherwise: *Sweeney v. Grape Sugar Co.*, 30 W. Va. 443; 8 Am. St. Rep. 88.

WILSON v. HUNTER.

[59 ARKANSAS, 626.]

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARY.—An adjoining owner who, by mistake, incloses or builds upon the land of his neighbor, intending to claim adversely to the real or true boundary only, does not thereby acquire a possession adverse or hostile to the true owner; but, if he takes possession of the land under the belief and claim that it is his, he acquires an adverse possession, even though the claim of title is the result of a mistake as to the boundary line.

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARY—INTENT.—The nature of the possession of an adjoining owner who incloses or builds upon the land of his neighbor depends upon the intent with which such possession is taken and held. To bar an action for the recovery of the land

so held the possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intent to hold adversely to, and not in conformity with, the rights of the true owner, and must continue for the full period prescribed by the statute of limitations.

G. Sibley, for the appellant.

627 **BATTLE, J.** This is an action of ejectment for the recovery of a small part of lot 11 in block 22, in the town of Forrest City, the width of which is twenty inches. The defendant owns the adjoining lot. One of the grantors, under whom she holds it, built a house on it, and in building extended it over on lot 11 about twenty inches. There is no evidence that he, the builder of the house, or any one claiming under him, ever held any written evidence of title to lot 11 or any part of it. Plaintiff says he built the house on the twenty inches through mistake, and with no intention of claiming or holding it. The defendant, on the other hand, says that she is entitled to, and does hold, it by virtue of adverse possession thereof held by her and her grantors for the statutory period. The documentary evidence read at the trial shows that the title was in the plaintiff and his grantors. Evidence was also adduced which tended to prove the claim of the defendant by adverse possession. The court instructed the jury that if they found from the evidence that the defendant and the grantors under whom she claims held open, notorious, and adverse possession of the land in controversy for seven years before the commencement of this action, the plaintiff could not recover, and to find for the defendant. The jury found for the defendant, and the plaintiff appealed.

The only question of law in the case is, What possession was necessary to enable the appellee to hold the land in controversy? We shall not, in answer to this question, attempt to review the numerous cases in which 628 courts have decided similar questions, but shall state our own views, and cite some of the cases sustaining them.

Where land belonging to one of two coterminous proprietors is inclosed or built upon by the other the intention with which the possession was taken and held is important in determining what rights, if any, were thereby acquired. No right or title can be gained against the owner by mere possession. To bar an action for the recovery of the land so held the possession must be actual, open, continuous, hostile, exclusive, and be accompanied by an intent to hold adversely

and "in derogation of," and not in "conformity with," the rights of the true owner, and must continue for the full period prescribed by the statute of limitations. There must be an intention to claim title. If one of two adjacent owners inclose or build upon his neighbor's land, "through mere inadvertence or ignorance of the location of the real line, or for purposes of convenience, and with no intention to claim such extended area," as said by the court in *Alexander v. Wheeler*, 69 Ala. 340, "but intending to claim adversely only to the real or true boundary line, wherever it might be, such possession would not be adverse or hostile to the true owner." But it would be, if he inclosed, or built upon and held, the land under the belief and claim that it was his own, even though the claim of title was the result of a mistake as to the boundaries of his own land. "In such a case," as said in *Alexander v. Wheeler*, 69 Ala. 340, "there is a clear intention to claim" the land occupied or inclosed, "and the possession does not originate in an admitted possibility of mistake": *Brown v. Cockerell*, 33 Ala. 45; *Alexander v. Wheeler*, 69 Ala. 340; *Abbott v. Abbott*, 51 Me. 584; *Hitchings v. Morrison*, 72 Me. 333; *Ricker v. Hibbard*, 73 Me. 105; *Ayers v. Reidel*, 84 Wis. 276; *Hamilton v. West*, 63 Mo. 93; ⁶²⁹ *Walbrunn v. Bal-len*, 68 Mo. 164; *Bunce v. Bidwell*, 43 Mich. 546.

In the case at bar there was evidence adduced at the trial which tended to show an intention to hold the land in controversy adversely, and that the possession of the appellee was in other respects sufficient to bar the appellant from recovering the land.

Judgment affirmed.

ADVERSE POSSESSION—MISTAKE AS TO BOUNDARY—INTENTION.—In cases of mistake as to the true boundary line between adjoining lands the real test as to whether or not title is acquired by a holding for the period of the statute of limitations is the intention of the party holding beyond the true line: *Watrous v. Morrison*, 33 Fla. 261; 39 Am. St. Rep. 139, and note, with the cases collected.

AM. ST. REP., VOL. XLIII.—5

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PERRY v. ROSS.

[104 CALIFORNIA, 15.]

A HOMESTEAD EXEMPTION PROTECTS THE LAND, and not any particular claim of title to it.

HOMESTEAD CLAIMANT DOES NOT TRANSFER HIS RIGHT BY ASSIGNING HIS CONTRACT OF PURCHASE.—If a husband in possession of land, after filing a declaration of homestead thereon, enters into a contract for its purchase from the owner, his assignment of the contract to secure borrowed purchase money does not create a lien upon the land, or convey to the lender either the contract right or the equitable title, although the declaration is filed before the purchase is made.

HOMESTEAD—POSSESSION.—One having possession of land is owner as to all the world except the holder of the legal title, and is entitled to the benefit of the Homestead Act.

APPEAL from a judgment and from an order denying a new trial.

John C. Deuel, for the appellant.

George A. Nourse, for the respondent.

1st TEMPLE, C. This is an action to quiet title. Plaintiff avers that she is the widow of Jesse L. Perry, deceased; that decedent died January, 1891, leaving him surviving plaintiff, his widow, and eight children; that letters of administration were duly issued to plaintiff, who qualified and administered the estate. Said Perry, in his lifetime, to wit, June 23, 1890, purchased from the Southern Pacific Railroad Company the tract of land in controversy, and said company, for a valuable consideration paid to it, agreed to make to said Perry, his heirs or assigns, when the deferred payments

should be made, a good and sufficient deed for the land; that the land was purchased with community funds; that said Perry ¹⁷ was then residing upon the land with his family, and on the eleventh day of December made and filed for record his declaration of homestead in due form; that thereafter, in the estate of said Perry, the same was duly set apart to plaintiff for a homestead; that the court did also find that the total value of said estate was less than fifteen hundred dollars, and thereupon set over to plaintiff all of the estate of said Perry for the support of herself and her minor children; that defendant claims title to the property, but without right.

Defendant answered, denying the allegations of the complaint, and for a separate defense averred that Jesse L. Perry, on the ninth day of December, 1890, being indebted to defendant, made, executed, and delivered to him his promissory note for two hundred and eleven dollars and twenty-one cents with interest, and, in case suit was instituted to collect the same, for attorneys' fees; that the said sum of two hundred and eleven dollars and twenty-one cents was part of the purchase money paid by said Perry for the said land, and that at the time of its execution said Perry assigned, transferred, and delivered to defendant all his interest in said land and the contract of purchase to have and to hold as security for the payment of the note; that no part of principal or interest of said note has been paid.

The case was tried without a jury, and the court found that the probate proceedings were in accordance with the allegations of the complaint.

The purchase was not made with community funds, but at the time of the purchase said Perry was married, and was residing on the premises with his family, and had filed a declaration of homestead thereon.

The court, in the probate proceedings, did set over to plaintiff all the right, title, and interest, claim and demand to said homestead which said Jesse L. Perry had at the time of his death, and had acquired by said purchase. And also found that the whole value of the estate of said Jesse L. Perry did not exceed fifteen hundred dollars.

¹⁸ But the plaintiff did not by any decree become entitled to the premises in suit or acquire any muniment of title thereto or to said contract of purchase.

That Jesse L. Perry executed the note described in the

answer in consideration of a loan to said Perry of two hundred and eleven dollars and twenty-one cents, which was a part of the purchase money paid for said land and contract of purchase; and that at that time said Perry assigned said contract to defendant as security for said note. Defendant is still the owner of the note, no part of which has been paid.

Plaintiff in her motion for a new trial attacks several of these findings as not justified by the evidence; among them: 1. That the purchase was not made with community funds; 2. That the money due on the note was a part of the purchase money; and 3. That the contract was assigned.

The first is entirely immaterial. If the money was community property the husband had the control and management of it. The point aimed at was not whether the money was or was not community property, but whether it was money advanced by defendant for the purchase of the land. Even though it had been so advanced it was still community property in the hands of Perry.

But the second is also of no consequence. If one having a homestead borrows money to buy an outstanding title, or claim of title against it, the lender does not thereby acquire a lien on the homestead. Nor can I see how there can be a resulting trust. No trust results in favor of one who lends money to another with which to buy land.

The real question in the case is raised under the third point. There was no conflict in the evidence. It is a question as to the effect of the evidence.

Does the statement in the note, "This note is secured by R. R. contract 10,353 for deed, given to Jesse L. Perry," together with the fact that the contract was ¹⁹ then delivered by Perry to Ross, create a lien upon the land or convey to Ross the contract right?

Perry entered into the contract after he had filed his declaration of homestead. That which is covered by the exemption is the land, and not any particular claim of title to it: *Sanders v. Russell*, 86 Cal. 119; 21 Am. St. Rep. 26; *Quackenbush v. Reed*, 102 Cal. 493; *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158.

When Perry entered into that contract he added to his claim of title by mere possession his right under the contract, which—if the vendor was the legal owner of the land—was an equitable title. He could not convey this equitable title

apart from the land, and he could not convey that except as provided in the homestead law.

The assignment of the contract would amount to nothing unless it carried the equitable title. It could not do that under the circumstances.

It is true, ordinarily, one having a contract for the purchase of land may transfer his rights by merely assigning the contract. But here is a statutory inhibition. It cannot be doubted but that Perry, after he had become the purchaser with the right of possession, could have acquired a homestead right in the premises. If he had done so he could not convey the land except in the statutory mode. He could not evade the statute and convey the land by assigning the contract of purchase.

I cannot see that it makes any difference that he filed his declaration before he made the purchase. Even then he had some evidence of title. Having possession he was owner as to all the world except the holder of the legal title, and he was entitled to the benefit of the Homestead Act.

I have assumed for the purpose of this opinion that the words quoted from the note with the delivery of the contract would amount to an assignment of the contract, if the land had not been a homestead. I doubt if ^{so} this would constitute an assignment, but under the view I have taken it is not necessary to determine that.

I think the judgment and order should be reversed.

SEARLS, C., and BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

GAROUTTE, J., VAN FLEET, J., HARRISON, J.

HOMESTEAD, IN WHAT PREMISES IT MAY BE ACQUIRED.—A homestead right does not depend upon the character of title held by the claimant thereof. The protection extends to whatever title he may have. Hence, a party having naked possession only of a tract of land may acquire a homestead right therein as to everybody but the true owner: *Spencer v. Geissman*, 37 Cal. 96; 99 Am. Dec. 248.

HOMESTEAD.—A PERSON RIGHTFULLY IN POSSESSION UNDER A CONTRACT OF PURCHASE is owner of the premises, within the meaning of the homestead law, and entitled to its benefits: *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267.

HOWELL v. HOWELL.

[104 CALIFORNIA, 45.]

DIVORCE—JUDGMENT WITHOUT AWARD OF ALIMONY—EFFECT OF.—A judgment in a divorce suit settling the property rights of the parties, without an award of alimony, is, after the time for appeal has elapsed, as final as any other kind of a judgment, except so far as the power to modify it may be reserved to the court itself, or is given by statutory provisions. In such a case, in the absence of any such reservation or power, the court has no jurisdiction to make an order or supplemental decree granting alimony for the support of the wife and children.

DIVORCE—ALIMONY—MODIFICATION OF ORDER.—The statutory provision authorizing the court, from time to time, to modify its orders for the maintenance and support of the wife and children contemplates that the right to alimony, as well as other property rights, shall have been presented and litigated in the action for divorce, and established by the judgment. If the right to alimony has been thus established, the amount may be changed by a modification of the order; otherwise there can be no modification, for there is nothing to modify.

L. V. Hitchcock and A. M. McCoy, for the appellant.

Charles G. Nagle and W. Henry Jones, for the respondent.

⁴⁵ MCFARLAND, J. This is an appeal by defendant from an order of the superior court requiring him to pay to plaintiff one hundred dollars per month from January 20, 1892, until the further order of the court.

On May 14, 1890, the parties were husband and wife; and on that day plaintiff commenced an action for divorce from defendant. She averred in her complaint, as ground for the divorce, desertion by the defendant; and she also averred that there were certain named minor children of the parties, and that there was certain community property in the territory of Wyoming worth about ten thousand dollars, and also certain personal property in California worth seven thousand one hundred dollars, and certain described real property here belonging to the community. She prayed for a divorce, the custody of the children, and that the court ⁴⁶ award to her all the said community property, real and personal, in California. The defendant, who then lived in Wyoming territory, was served by publication and made default. The court entered a decree on September 11, 1890, in accordance with the prayer of the complaint. There was nothing in either the complaint or the judgment about alimony. By the judgment the property prayed for in the complaint was awarded to plaintiff, but it contained nothing more about property,

money, or property rights of any kind. The judgment has never been appealed from or in any way disturbed.

On January 20, 1892—more than fourteen months after the judgment—plaintiff filed a petition entitled in said divorce suit, in which, after alleging certain property and income of defendant, she averred that she was in indigent circumstances and unable to support herself and said minor children, and that “the sum of two hundred and fifty dollars is a reasonable sum per month to be allowed plaintiff to support herself, and support and educate her said minor children.” She then prays that, in addition to counsel fees, defendant “pay to plaintiff such further sum as to this court may seem just for support of plaintiff and said minor children,” and that “said alimony be made permanent.” The defendant demurred to the petition upon the ground, among others, of want of jurisdiction. The demurrer was overruled, and defendant answered. His answer was stricken out for reasons not necessary to be here noticed. The court made findings, reciting the history of the divorce, and declaring that defendant had certain property and income, that plaintiff had two minor children dependent upon her, and that she “has not separate property nor any property sufficient to maintain herself and said minor children.” Whereupon the court made an order “that defendant pay to plaintiff the sum of one hundred dollars per month on the twentieth day of each and every month, commencing on the twentieth day of January, 1892, and the defendant do continue to pay said sum to the plaintiff on the twentieth day of each and every ⁴⁷ month thereafter until the further order of this court.” From this order defendant appeals.

We are satisfied that the court had not jurisdiction to make the order appealed from. A judgment in a divorce suit settling the property rights of the parties, after the time for appealing therefrom has expired, is as final as any other kind of a judgment, except so far as the power to modify it is given by statutory provision. Of course, when we speak of a final judgment, we mean one which does not upon its face reserve jurisdiction (when that can be done) to make a supplemental decree, in which case it is not final. In the case at bar there was no such reservation; it was final in form and substance. And there is no statutory provision giving jurisdiction to make the order appealed from. Section 137 of the Civil Code provides that “while an action for

divorce is pending" the court may require the husband to pay as alimony money necessary to enable the wife to support herself and children and prosecute or defend the action. Section 139 provides that where a divorce is granted for an offense of the husband the court may compel him to provide for the maintenance of the children and make a suitable allowance for the support of the wife; and that "the court may from time to time modify its orders in these respects." But the latter section clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce and established by the judgment; and the provision is that, where the right to alimony has been thus established, the amount may be changed by a modification of the order. But in the case at bar there was nothing to "modify." After the judgment granting the divorce the plaintiff was no longer the wife of the defendant; and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. In the case at bar the judgment became final without any award of alimony; and, of course, the court could not afterward ⁴⁸ "modify" what never existed. In Stewart on Marriage and Divorce, section 366, the authorities are correctly summed up in this language: "When the court has allowed the suit to be dismissed, or has finally entered the decree, it has no further jurisdiction over the parties or the subject matter, except so far as this is reserved by itself or by statute." And in section 376 the author further says: "But a decree of divorce *a vinculo* is final, and the jurisdiction of the court over the parties is, after the expiration of the term, at an end; and just as there can be no grant of alimony after such a divorce, so there can be no change in the award of alimony, unless the right to make such a change is reserved by the court in its decree, as it may be, or is given by statute, as it often is": See, also, *Kamp v. Kamp*, 59 N. Y. 212; and *Egan v. Egan*, 90 Cal. 15. In the cases cited by respondent the right to alimony had been established in the final decree, or the disposition of the question of alimony had been expressly reserved for further consideration. Our conclusion is that the court below had no jurisdiction to make the order appealed from, and that the demurrer to the petition should have been sustained.

It is not necessary here to determine what order the court

might make "after judgment," under section 138 of the Civil Code, with respect to the "custody, care, and education of the children of the marriage." The order under review is for alimony for the wife, and for her support; and its character is not changed by the mention of the children.

The order appealed from is reversed.

DE HAVEN, J., and FITZGERALD, J., concurred.

Hearing in Bank denied.

DECREE FOR ALIMONY—CONCLUSIVENESS OF.—A decree of divorce and alimony allowed are conclusive under the conditions existing at the time of the decree; and the object of a statute authorizing changes to be made in the decree is only to adapt it to new and changed circumstances of the parties: See monographic note to *Buckminster v. Buckminster*, 88 Am. Dec. 658, discussing the power of a court to decree alimony after divorce granted. Application for a change in the amount of alimony after divorce must be founded upon new facts which have occurred since the decree was originally made, and, in the absence of new facts, such decree is deemed to be *res judicata*: *Cole v. Cole*, 142 Ill. 19; 34 Am. St. Rep. 56.

PEOPLE v. KILVINGTON.

[104 CALIFORNIA, 86.]

ARREST.—A PEACE OFFICER HAS THE RIGHT, without a warrant, to arrest any person in the night, when he has reasonable ground to believe that such person has committed a felony.

ARREST—PROBABLE CAUSE—QUESTION OF LAW.—If a police officer intending to arrest a person kills him the question whether he had probable cause to believe, or reasonable ground for suspicion, that the deceased had committed a felony is one of law for the court, where the facts are undisputed.

ARREST, PROBABLE CAUSE FOR—SUBMISSION OF FACTS TO JURY.—In the event of conflicting evidence as to the facts of an arrest it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts.

ARREST.—PROBABLE CAUSE FOR EXISTS if there is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person about to be arrested is guilty of the offense charged.

ARREST OF FLEEING PERSON CHARGED WITH THEFT.—The circumstance that a person is fleeing at night from one who is shouting "stop thief" affords a police officer as much reason to suspect or believe that he may have committed robbery, or burglary, or grand larceny, as that he may have merely committed petit larceny, and justifies an attempt to arrest.

ARREST OF FLEEING PERSON—SHOOTING—CRIMINAL NEGLIGENCE.—Whether the act of a police officer in shooting a fleeing person at night in attempt-

ing to effect his arrest is or is not an act of criminal negligence, is a question for the jury, who must give the officer, upon the trial of an information for murder, the benefit of any reasonable doubt arising upon the evidence.

ARREST OF FLEEING PERSON—EVIDENCE.—If a police officer not recognizing a fleeing person, and not knowing any thing about his business, shoots him while attempting to effect an arrest, evidence tending to show that the deceased went on the particular night to the place near where he was shot, on lawful business, is irrelevant and inadmissible.

KILVINGTON was charged with the murder of one Henry Schmidt. He was convicted of manslaughter and sentenced. This appeal was from the judgment, and from the order denying a motion for a new trial. The defendant was a police officer. On the night of May 3, 1892, on Taylor street, in the city of San Jose, he saw two men running near by, one in advance, and the other pursuing, and crying out "stop thief"! The night was dark, but the parties were visible at some distance. The officer two or three times ordered the man in advance to stop, which orders were disobeyed; but the stranger threw up his hands, when, as defendant claimed, he saw something in his hands, and, drawing his own pistol, fired and killed the man, who was about thirty feet away. It proved to be Schmidt, who had no weapons on his person. He was not recognized by the officer. Kilvington did not consider himself in danger, but testified that he thought the man was a criminal, and fired to intimidate him, to cause him to stop, so that the officer could investigate, and with that object endeavored to shoot over his head, but the ball entered his neck. The officer said that he had every reason to believe that the man was a criminal, but could n't tell whether he "had stolen a loaf of bread or robbed a bank." The man in pursuit was W. H. Howard, who was passing the house of one Mrs. Hayford, when Schmidt ran out of the back yard, and Howard, thinking he was a criminal, pursued him, crying "stop thief"! for some distance, with the result above stated.

William P. Veuve, for the appellant.

Attorney General W. H. H. Hart, V. A. Scheller, and Spencer & Burchard, for the respondent.

89 DE HAVEN, J. There is no conflict in the evidence as to the circumstances under which the defendant killed the deceased, and, in order to determine whether his act was excusable or not, it was necessary for the jury to consider, first,

whether the defendant was justified in attempting to arrest the deceased at all; and, if so, whether the act of shooting merely for the purpose of intimidating, and thus causing the deceased to stop, and without any intention of killing or wounding him, was or was not criminal negligence. It was important to the defendant to have these questions, and the law in relation to each, clearly and separately stated to the jury. The court correctly instructed the jury that a peace officer has the right without a warrant to arrest any person in the night, when the officer has reasonable ground to believe that such person has committed a felony: Pen. Code, sec. 836; *Burns v. Erben*, 40 N. Y. 463. But the court erred in the manner in which it submitted the question of probable cause to the jury. Upon this point the court gave the following instruction: "It is for the ^{the} jury to determine from all the facts and circumstances of the case whether the defendant had reasonable cause to believe that a felony had been committed by the deceased. If you find from the evidence that he had such cause for belief you will then determine whether, in the attempt to arrest the deceased, he used only such means as were necessary to prevent the escape of the deceased, and to effect his arrest."

This instruction submitted to the jury the entire question in reference to the existence of probable cause upon the part of the defendant to arrest the deceased, and that body was called upon not only to find whether the facts relied upon by the defendant to show such probable cause were true, but also, if true, to determine whether or not they were legally sufficient for that purpose. The instruction was erroneous, as it is not the province of the jury to decide in any case whether the facts and circumstances which they may find established by the evidence are sufficient to constitute probable cause. This principle of law is now settled beyond doubt or controversy, as a reference to a few of many cases which might be cited on that point will show. "This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts": *Burns v. Erben*, 40 N. Y. 463; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Masten v. Deyo*, 2 Wend. 425; *Pang-*

burn v. Bull, 1 Wend. 345; *Driggs v. Burton*, 44 Vt. 124; *Panton v. Williams*, 2 Ad. & E., N. S., 169; *Sutton v. Johnstone*, 1 Term Rep. 493, 545. And our predecessors, in passing upon the same question in *Harkrader v. Moore*, 44 Cal. 152, said: "The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and therefore one to be determined by the court. When the facts in reference to the alleged probable cause are admitted or established ⁹¹ beyond controversy, then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause." The same rule is also announced in *Grant v. Moore*, 29 Cal. 644; *Fulton v. Onesti*, 66 Cal. 575; and in the late case of *Ball v. Rawles*, 93 Cal. 222; 27 Am. St. Rep. 174, where the whole question is elaborately discussed.

As already stated, the facts in this case were undisputed, and the court ought, therefore, to have instructed the jury as to their sufficiency in law to justify the defendant in attempting to arrest the deceased; that is, whether they were legally sufficient to induce a reasonable belief in the mind of the defendant that the deceased had committed a felony. The defendant requested the following charges upon this point:

"12. The court instructs the jury that, if the defendant saw the deceased running at night, pursued by Howard, and Howard was crying out 'stop'! or 'stop thief'! and the deceased, on being ordered to stop by the defendant two or three times, and refusing to do so, but continuing his flight, then the defendant had reasonable cause to believe the defendant (deceased) had committed a felony."

"14. The court instructs the jury that the uncontradicted evidence in this case shows that the defendant had reasonable cause to believe at the time of the killing that the deceased had committed a felony."

The refusal of these instructions presents the most important question of law arising upon this appeal, as it is manifest that if either one had been given (the facts recited in the first

one being established without any conflict whatever in the evidence), the inquiry of the jury would have been restricted to the single question ⁹² whether the defendant exercised due care and caution in what he did in attempting to effect the arrest of the deceased; or, stated in another form, the question before the jury would have been, Was the shooting in the direction of deceased for the mere purpose of intimidation, without any intention of killing him, an act of criminal negligence upon the part of the defendant? The refusal of the court to thus narrow the inquiry was clearly prejudicial to the defendant, if, under the undisputed facts, he had, in the judgment of the law, probable cause to arrest the deceased, for the jury may have found the defendant guilty because, in their judgment, the facts were not sufficient to justify him in attempting to make such arrest; and this brings us to the consideration of the question, Did the defendant, in view of the facts, as presented to him at the time, have reasonable or probable cause to believe that the deceased had committed a felony?

There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause, such as will justify one in arresting or prosecuting another upon a criminal charge; and, perhaps, as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in *Bacon v. Towne*, 4 Cush. 217: "There must be such a state of facts," said he, "as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion that the person is guilty." Applying this rule to the facts of this case we think it must be held that the defendant had reasonable cause to believe that the deceased may have committed a felony. It is true the deceased was not charged in terms with the commission of a felony, but this was not necessary in order to justify the defendant in entertaining a reasonable suspicion that he was guilty of a felony. It was night; the deceased was fleeing, pursued by a person who was shouting "stop thief"! This was in effect a charge that the deceased had committed a theft of some kind, and the defendant had just as much reason to suspect or ⁹³ believe that the deceased may have committed robbery, or burglary, or grand larceny, as to suppose that his pursuer only meant by the cry of "stop thief"! to charge him with petit larceny. The defendant was called upon to act promptly, and, as the language used by the witness

Howard was broad enough in its popular sense to import a charge of felony, the defendant was justified in attempting to arrest the deceased. An officer who would refuse to arrest a person fleeing and pursued under the circumstances disclosed in this case, because the charge was not more direct and specific as to the commission of a felony, would be justly censurable for a neglect of official duty. In considering this question of probable cause upon the part of the defendant to arrest the deceased we are to look only at the facts and circumstances presented to him at the time he was required to act. The defendant did not recognize the deceased before he fired, and the fact that the latter was an innocent and respectable citizen, and who may have been fleeing from an assailant, cannot be allowed to affect the question we are now discussing.

It is only necessary to add upon this point that in our opinion the court ought to have instructed the jury that the defendant had the right, under the circumstances established by the evidence, to arrest the deceased, leaving the jury to determine the further question whether the act of shooting the deceased in attempting to effect such arrest was or was not an act of criminal negligence upon the part of the defendant. This latter is purely a question of fact, and its determination must be left to the sound judgment and discretion of the jury, and in the decision of which question the defendant is entitled to the benefit of any reasonable doubt arising upon the evidence.

The court also erred in admitting the evidence of the witnesses Schloss and Weissel tending to show that deceased went down to the place near where he was shot on that particular night on lawful business. This fact was wholly irrelevant. The defendant knew nothing of the matter, and did not recognize the deceased at the time of the shooting. The evidence, therefore, was wholly irrelevant, as it threw no light whatever upon the question whether the defendant was justified in attempting to arrest the deceased under the circumstances as actually presented to him; nor did it have any bearing upon the question whether or not the defendant was guilty of criminal negligence in shooting the deceased.

The motion of defendant to set aside the information was properly denied, and the court did not err in refusing to give the instructions numbered 2, 3, 15, 18, and 24, requested by the defendant.

We do not deem it necessary to notice the other points discussed in the brief of counsel.

Judgment and order reversed, and cause remanded for a new trial.

FITZGERALD, J., MCFARLAND, J., HARRISON, J., GAROUTTE, J., VAN FLEET, J., and BEATTY, C. J., concurred.

ARREST—FELONY.—It is lawful for an officer to kill a fleeing felon when he cannot otherwise be taken, and the necessity for such killing is for the jury to determine: *Jackson v. State*, 66 Miss. 89; 14 Am. St. Rep. 542, and note. A fleeing person may be arrested on suspicion of a felony, but the officer must act prudently and honestly, after making such inquiry and examination as the circumstances of the case afford. In such a case, the facts being undisputed, the question of probable cause is for the court: *Filer v. Smith*, 96 Mich. 347; 35 Am. St. Rep. 603. An arrest on suspicion of felony may be made without a warrant, but the amount of force which may be lawfully used in effecting an arrest is no more than is actually necessary to secure the arrest and safe custody of the accused: See monographic note to *Hawkins v. Commonwealth*, 61 Am. Dec. 161, 162, on arrest.

RANDALL v. DUFF.

[104 CALIFORNIA, 126.]

APPEAL FROM JUDGMENT MODIFIED ON APPEAL.—An order of the trial court modifying a judgment in accordance with the directions of the supreme court made on a prior appeal, and the judgment as modified, are both appealable, and appeals taken therefrom will not be dismissed on the ground that they are frivolous.

S. M. Buck and W. C. Belcher, for the appellant.

W. L. Duff, L. D. McKisick, and H. S. Foote, for the respondents.

126 The COURT. Motion to dismiss the appeal herein on the following grounds:

“1. That the action of the lower court in modifying the judgment or decree in said action, as directed by the supreme court, was a ministerial act only, and one in which the lower court had no jurisdiction, and is not an act or order from which an appeal will lie.

“2. That the judgment or decree rendered in said action on the third day of June, 1892, and modified as directed by the supreme court on the third day of March, 1894, by the superior court, is a final judgment in said **127** action, already approved and passed upon by the supreme court as a final

determination of said action; and no further appeal lies therefrom.

“That the so-called order from which plaintiff has appealed is not an appealable order.”

When this case was last here on appeal (101 Cal. 82) the judgment of the court below was “affirmed in all respects except as to the matter of interest, as to which the judgment was reversed and the cause remanded to the superior court, with direction to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly.”

The present appeal is taken from the order of the court below modifying the judgment as to the matter of interest and from the judgment as modified.

It may be true, as claimed, that the order and judgment appealed from were made and amended as directed by this court, and that the appeal is frivolous and vexatious, and was taken merely for the purpose of delay; but that is a matter which can only be determined by an examination of the record on appeal, and this we have held will not be done on a motion to dismiss an appeal.

In *People v. McNulty*, 95 Cal. 595, it was held that to dismiss an appeal “upon the ground that it is frivolous is to refuse to consider its merits, and, therefore, there can be no dismissal of an appeal on the ground that it is without merit; for to reach this conclusion the merits must be considered and the record must be examined.” To the same effect is *Howell v. Howell*, 101 Cal. 115.

As the order modifying the judgment, and the judgment as amended, are both appealable, it follows that the motion to dismiss the appeal herein should be denied.

So ordered.

Justice DE HAVEN, being disqualified, did not participate in the foregoing decision.

APPEALABLE ORDERS AND JUDGMENTS, GENERALLY, INSTANCES OF: See monographic note to *Davis v. Davis*, 20 Am. St. Rep. 173, 174.

THOMPSON v. GORNER.

[104 CALIFORNIA, 168.]

NEGOTIABLE INSTRUMENTS—INCREASE OF INTEREST.—A provision in a note for an increased rate of interest, if payments are not made when due, is not a penalty, but a contract. By accepting the original rate the payee waives his right to collect a greater rate for the time past, but not to demand the increased rate for the future. As to future interest the note is an executory written contract alterable only by a contract in writing or by an executed oral agreement, as provided by statute.

Edgar B. Haymond, for the appellant.

John Yule and Edward H. Stearns, for the respondent.

¹⁶⁹ MCFARLAND, J. This is an action to foreclose a mortgage given to secure a promissory note. The appeal involves only a small amount of interest on the principal of the note. The note was dated March 20, 1888, and matured two years after date. The interest clause which gives rise to the present controversy is as follows: "With interest thereon, in like gold coin, from the date hereof until paid, at the rate of eight per cent per annum, payable monthly, in advance, and if said principal or interest is not paid as it becomes due it shall thereafter bear interest at the rate of one per cent per month." The monthly interest was paid each month until the maturity of the note. After that, the principal not having been paid, the defendant continued to pay to plaintiff, who was the holder of the note, the monthly interest at eight per cent per annum; and said interest at said rate was received by plaintiff and accepted by her as payment of said monthly interest until February 20, 1892. On said last-named day defendant offered to pay a month's interest as usual—at the said rate of eight per cent per annum—but the plaintiff refused to receive it, and claimed interest at one per cent per month as provided in the note. On March 18, 1892, defendant tendered to plaintiff the whole amount of principal due, and also the amount of interest due rated at eight per cent per annum. This the plaintiff refused to receive as full payment of the whole indebtedness on the note and mortgage; and ¹⁷⁰ on March 31, 1892, she commenced this action. The court below held, as conclusions of law, that the one per cent per month was in the nature of a penalty; and also that plaintiff, having accepted the monthly interest at eight per cent per annum for nearly two years, waived any claim of

right to exact one per cent per month interest after the maturity of the note.

When this appeal was in department it was held that the one per cent clause in the note was not to be treated as a penalty, but as a contract to pay one per cent per month interest upon a contingency shown to have happened; but that the acceptance by plaintiff of the interest at eight per cent per annum was a waiver of her claim to collect more interest for the months for which she had so accepted the interest at eight per cent. We are satisfied with both of these conclusions, and adhere to them.

But it was also held in department that plaintiff, by accepting the eight per cent for past months, waived her right to demand the one per cent per month in the future. Plaintiff's points and authorities were very meager, covering only one page and referring only to the question of penalty. In her petition for hearing in Bank her counsel calls our attention to section 1698 of the Civil Code, which reads as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." Under the principle of this section the plaintiff was entitled to recover interest at one per cent per month for the time during which she refused to accept, and did not accept, interest at eight per cent per annum. She did not contract in writing to change the interest as expressed by the written terms of the note; and her acceptance of the eight per cent was of no higher dignity than an express oral agreement. But it was an executed agreement only as to months for which she accepted the interest at eight per cent; as to the future it was executory (*Erenberg v. Peters*, 66 Cal. 114; *Taylor v. Soldati*, 68 Cal. 27; *Simmons v. Hamilton*, 56 Cal. 493), and void under said ¹⁷¹ section of the code: *Johnson v. Polhemus*, 99 Cal. 240. It does not clearly appear from the transcript, which by stipulation does not include all of the judgment-roll, whether or not plaintiff claims as interest the difference between eight per cent and the one per cent for the months during which she accepted the eight per cent, but she is not entitled to said difference for said months. She is entitled, however, to interest at one per cent per month from the time she first demanded it. She should have judgment for the amount of the principal and interest thereon from and after the twentieth day of February, 1892, at one per cent per month.

The judgment is reversed, with direction to the superior court to render judgment for the plaintiff for the amount due and unpaid upon the principal of the note, together with interest thereon from February 20, 1892, at one per cent per annum.

HARRISON, J., FITZGERALD, J., DE HAVEN, J., and VAN FLEET, J., concurred.

INTEREST—INCREASED RATE AFTER MATURITY—PENALTY.—If money is loaned at a specific rate of interest on a note containing a provision that if not paid at maturity the maker shall pay a higher rate of interest thereafter, the higher rate is in the nature of a penalty, and the payee can recover interest after maturity only at the lower rate agreed upon: *Richardson v. Campbell*, 34 Neb. 181; 33 Am. St. Rep. 633, and note.

McLAUGHLIN v. McLAUGHLIN.

[104 CALIFORNIA, 171.]

INSURANCE—BENEFIT SOCIETY—MODE OF CHANGING BENEFICIARY.—The laws of a mutual benefit society prescribing a mode of changing the beneficiary must be followed. It cannot be made in any other manner. Hence, if that mode is confined to the surrender of the old, and the issuance of a new, benefit certificate, and the insured, having the power, fails to make official application for the change, and to pursue the proper course to effect it, no change can be made by his oral declarations of intention merely, or by the delivery of the certificate to the person whom he wishes to become his new beneficiary.

INSURANCE—BENEFIT SOCIETY—RIGHTS OF BENEFICIARY.—The willingness of a mutual benefit society, after the death of the insured, to pay into court the money called for by the certificate, to be disposed of as the court may direct, cannot affect the rights of the beneficiary, as the society has no power by stipulation, or otherwise, to change or affect those rights.

APPEAL from a judgment and from an order refusing a new trial.

Marcus Rosenthal, for the appellants.

Jones & O'Donnell, for the respondent.

¹⁷² **BELCHER, C.** In July, 1886, Alexander McLaughlin became a member of Mission Council of the Order of Chosen Friends, a corporation organized and existing under the laws of the state of Indiana, and received a relief fund certificate, stating that he had become a member of the order "and entitled to all the rights and privileges of membership, and a

benefit of not exceeding ¹⁷³ two thousand dollars from the relief fund of said order, which sum shall, in case of death, be paid to the nephews and nieces, John, Robert, Jennie, and Lottie McLaughlin, children of Armor McLaughlin, in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership." Afterward Mission Council was dissolved, and he became a member of Home Council of the same order, and continued to be a member thereof, in good standing, until he died, on March 28, 1890. On February 18, 1890, he and the plaintiff intermarried, and thereafter were husband and wife up to the time of his death.

In August, 1890, the plaintiff commenced this action against the four beneficiaries named in the relief fund certificate, their father, Armor McLaughlin, and the Supreme and Home Councils of the Order of Chosen Friends, alleging in her complaint facts which it was claimed entitled her to the two thousand dollars to be paid on the death of her husband.

Before the trial of the action all the parties thereto entered into a written stipulation whereby the said councils disclaimed any and all interest or right in or to the two thousand dollars in controversy, and whereby it was agreed that the said sum of money should be deposited in a certain savings bank, in the names of the attorneys of the parties, in trust for the person or persons who should be found entitled thereto by the final judgment to be rendered in the action. And in pursuance of this stipulation the money was deposited as agreed, and the action was then dismissed as to the defendant councils.

After trial the court found the facts to be substantially as alleged in the complaint, and as conclusions of law that the plaintiff was entitled to the said money. Judgment was accordingly entered in her favor, from which, and from an order denying a new trial, the defendants McLaughlins appeal.

Appellants contend that the decision was not justified ¹⁷⁴ by the evidence, and was against law, and also that several errors of law were committed by the court in its rulings upon the admission of evidence.

The constitution and laws of the order contain the following provisions:

"SEC. 111. There shall be connected with this order a relief fund, from which each beneficiary member, the person or per-

sons designated by said member related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw a sum not exceeding the amount named in his or her certificate, as hereinafter specified. During his or her life each member shall have full control of his or her interest in this fund," etc.

"SEC. 162. Each member shall enter upon his application the name or names of the person or persons related to him or her to whom he or she desires the benefit to be paid in case of death, subject, however, to such future disposal of the benefit as the member may thereafter direct, not in conflict with section 111, and the same shall be entered in the relief fund certificate according to such direction."

"SEC. 172. A member in good standing may, at any time, surrender his or her relief fund certificate and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her, as the member may direct, upon payment of the certificate fee (\$1)."

To establish the plaintiff's right to the money as against the beneficiaries named in the certificate, evidence was introduced on her behalf showing the following facts:

C. L. Stone was the secretary of Mission Council when Alexander McLaughlin became a member thereof, and continued to be its secretary until it ceased to exist, and as such secretary he issued to McLaughlin his relief fund certificate. They were intimate friends, and in 1888 both became members of Home Council at the ¹⁷⁵ same time. McLaughlin never attended any of the meetings of either council after his initiation. Stone was never secretary of the new council, but he paid all of McLaughlin's dues, and from time to time furnished him with receipts therefor signed by its secretary, who was a Mrs. Carroll.

About a week after plaintiff and McLaughlin were married he gave her his certificate, and she put it away, and thereafter retained possession of it until after his death. At the time of handing the certificate to her he told her he was going out that day to see Mr. Stone and have it changed to her name. He returned in the evening and told her he had not been able to find Mr. Stone. On March 7th he saw Stone and told him he desired to have the certificate changed and made payable to his wife, and thereupon they agreed to meet at the next regular meeting of the Home Council, to be

held on March 11th, and have the change made. Stone then told him that it would be necessary to write out an application to the secretary and to surrender the certificate. He told his wife of the appointment made with Stone, and together they went to the meeting agreed upon, but Stone was not there, and nothing was done. Three days later he was taken sick with pneumonia, from which sickness he never recovered. On March 23d plaintiff sent word to Armor McLaughlin telling him of her husband's condition. Armor called that evening, and finding his brother very sick advised him to transfer all his property to his wife. Alexander then asked Armor to have the certificate changed and made payable to his wife, and asked her to get the certificate, which she did. Armor read it over and then handed it back, saying, "I will attend to it to-morrow." As Armor was leaving the house that evening he said to one Webster, a brother in law of the plaintiff, that he would go the first thing the next morning and have the certificate changed, and that in case he could not get it changed or his brother should die he would draw the money in the children's names and turn it over to the ¹⁷⁶ plaintiff. Armor called again the next day, and in his presence Alexander then transferred to his wife all his property, consisting of a lot in Seattle and two thousand five hundred dollars money on deposit in a bank, and during that day Armor stated to said Webster that he had sent one Hansen with twenty-five dollars to see the secretary and have it all straightened out. And in the afternoon of the same day Alexander called Webster to his bedside and asked him if every thing had been straightened, and mentioned the certificate, and Webster, relying on what Armor had told him, said it had; and he said it was all right. Plaintiff first learned that she had not been substituted as beneficiary about a month after her husband's death. Meantime plaintiff had frequently asked Armor about the certificate, but he gave no definite answer, and said he did n't know any thing about the laws of the society, but any way she would not hear any thing for sixty or ninety days.

It is urged on behalf of respondent that the laws of mutual benefit associations, providing how a change of beneficiaries may be made, are for the protection and benefit of the association alone, and that when in this case the councils entered into the stipulation above referred to and thereby disclaimed any right to the money in controversy they in effect waived,

as they might do, a compliance with their laws by McLaughlin, and hence that appellants cannot invoke them for their benefit.

It is further urged that, since McLaughlin expressed a desire to have the certificate changed by substituting respondent as beneficiary therein, and took the steps indicated to accomplish that end, it should be regarded, under the rule that equity will consider that done which ought to be done, as in fact changed so as to entitle respondent to the money.

We do not regard the stipulation as in any way material to a determination of the case. It shows only that the councils made no claim to the money, and were willing to pay it into court, and let it go to the party or parties who might be adjudged entitled to it. It is true ¹⁷⁷ that during his life McLaughlin had full control over his interest in the fund, and had a right at any time to have his certificate changed by substituting a new beneficiary. And while he lived the beneficiaries named in the certificate had no vested interest in the money to be paid on his death. But when he died the right to the money did vest either in the respondent or appellants, and the councils had thereafter no power by stipulation or otherwise to change or affect that right.

The question, then, is, Did the expressed desire of McLaughlin to have the respondent substituted as beneficiary and the steps taken to that end have the effect to make the change, when the certificate was not surrendered but remained all the time in respondent's possession, and no application was made to the secretary or other officer to have it changed?

This is the first time that a question of this character has ever been presented to this court for decision, but there have been numerous decisions in other states directly bearing upon it. The general and prevailing rule, as shown by these decisions, is that when the laws of a benefit society prescribe a mode of changing the beneficiary the mode prescribed must be followed, and no change can be made in any other manner: See Niblack on Mutual Benefit Societies, sec. 221, et seq., and cases cited; also Bacon on Benefit Societies, sec. 307, and cases cited.

In *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, it was held that, as the provisions of the constitution pertaining to the subject were a part of the contract of insurance, the insured could not make any change of beneficiaries, except

by compliance therewith, and also that expressed intentions and oral declarations can have no effect to change beneficiaries. And in that case, as in this, it was claimed, that as the order was willing to pay the money into court, to be disposed of as should be directed by the final judgment, it had waived a compliance with its laws. The court said: "But it is said this ¹⁷⁸ is a matter to which the defendant can only object. We think differently. While the heirs, during the life of the assured, had no right in the policy, their interest being nothing more than in expectancy, upon his death they acquired rights which cannot be cut off except in the manner prescribed by the contract. If that was not done the defendant could not, even by positive consent after their rights had attached, by act or word do any thing to defeat these rights. It is controlled by the contract as it was at the death of the assured."

In *Supreme Conclave, Royal Adelpia, v. Cappella*, 41 Fed. Rep. 1, the general rule is declared as follows: "In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer."

It is said in that case, however, that the general rule is subject to three exceptions: 1. If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; 2. If it be beyond the power of the insured to comply literally with the regulations a court of equity will treat the change as having been legally made; 3. If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued he dies, a court of equity will treat such certificate as having been issued.

The same exceptions are recognized in some of the other cases, but it is evident that this case does not come within either of them. Here the council did not waive a compliance with its laws, and issue a new certificate, and it was not beyond the power of the insured to comply literally therewith. Nor did the insured pursue the course pointed out by the laws and do all in ¹⁷⁹ his power to have the

change made. He might have had the certificate surrendered as required, but this was never done or attempted to be done, and no application to the secretary for a change was made.

We conclude, therefore, that the case falls within the general rule, and that the beneficiaries named in the certificate were entitled to the money, and the court below should have so determined.

We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

SEARLE, C., and VANCLIEF, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

DE HAVEN, J., MCFARLAND, J.,
VAN FLEET, J., HARRISON, J.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS.—The only restriction upon the power of a member of such an association to change his beneficiary at will is such as is found in the statute, charter, or by-laws of the society. The change must be made in the manner designated in such provisions, or it will be void: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 790, discussing mutual benefit associations; *Grace v. Northwestern Mut. Relief Assn.*, 87 Wis. 562; 41 Am. St. Rep. 62.

MONTGOMERY v. SANTA ANA WESTMINSTER RY. CO.

[104 CALIFORNIA, 186.]

STREETS—RAILWAY FRANCHISE ON—EJECTMENT BY ABUTTING OWNER.—

The owner in fee of land abutting upon a public street in an incorporated town cannot maintain an action of ejectment against a railway company which, under and by virtue of an ordinance of the town trustees empowering it to do so, has constructed and is using a railway track upon and over the public street, upon the side or half thereof adjoining the land of such abutting owner.

URBAN SERVITUDES—RAILWAY TRACKS—COMPENSATION TO OWNER.—

Urban servitudes are essential to the enjoyment of streets in cities, and authorize the use of a street for the track of a street-car company under a license by the city authority, without compensation to the owner of the fee. It makes no difference whether such use is for the transportation of passengers or freight.

SERVITUDES—USE OF STREET FOR RAILWAY PURPOSES—DAMAGES.—The use of a public street in a city for general railway purposes does not

impose any new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control. They are also subject to an action for damages by an abutting owner whose right of ingress and egress, or right to light and air, will be interfered with, whether or not he may be vested with the fee to the center of the street.

PUBLIC USE IN STREETS—EJECTMENT.—Public streets are in the possession of municipal authorities as trustees of the public who hold them for the use of the public as effectually as they do, or may, the public buildings of the municipality. Ejectment will not, therefore, lie at the suit of an abutting owner, to recover the possession of any part of the street from a railway company using it under a municipal franchise.

James G. Scarborough, for the appellant.

Victor Montgomery, for the respondent.

187 The COURT. This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange.

Plaintiff had judgment, from which, and from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out:

1. That it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along, and upon any street, avenue, or highway.

2. That a strip of land thirty feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of, and in the possession of, the board of trustees of said city.

3. That said board of trustees by ordinance authorized and licensed defendant to construct and operate a railroad through and over said street, for carrying freight and passengers in cars to be propelled by dummy or motor engines.

4. That it constructed its road on said street and operated it as provided in said ordinance.

5. That it has not excluded defendant or others from the street, and has only used it for the purpose aforesaid and in common with the public, and has not impaired said street or curtailed the use thereof by others, etc.

To this defense plaintiff demurred upon the ground that it did not state facts sufficient to constitute a defense.

The demurrer was sustained by the court, and defendant

declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus: Can the owner in fee of land abutting upon ¹⁸⁸a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town, which company, under and by virtue of an ordinance of the trustees of the first designated town empowering it to do so, has constructed and is using a railway track upon and over said public street, and upon the side or half thereof adjoining the land of such abutting owner?

The question is stated thus for the reason that while the evidence in the case, consisting of the deed to respondent and the city map together, show that his land abutted upon the street in question viz., Second street, in the city of Santa Ana, yet, by section 1112 of the Civil Code, "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto.

All streets are highways, but not all highways are streets: *Common Council v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 Ind. 74; *Clark v. Commonwealth*, 14 Bush, 166.

In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and as a sequence in the extent of the servitude in the land upon which they are located.

The country highway is needed only for the purpose of passing and repassing, and, as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use.

¹⁸⁹ In the case of streets in a city there are other and further uses, such as the construction of sewers and drains, laying of gas and water pipes, erection of telegraph and tele-

phone wires, and a variety of other improvements, beneath, upon, and above the surface, to which, in modern times, urban streets have been subjected.

These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely populated limits. It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made, but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustees of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways": *People v. Kerr*, 27 N. Y. 202; *Cincinnati v. White*, 6 Pet. 432; Thompson on Highways, 7; Elliott on Roads and Streets, 305.

It is said by Elliott in his work on Roads and Streets, at page 299, that "it is doubtful whether of all servitudes there is one so broad and comprehensive as that of a city in its streets."

It authorizes the use of the street for the track of a street-car company under license by the city authority without compensation to the owner of the fee: *Finch v. Riverside etc. R. R. Co.*, 87 Cal. 598.

A street railway has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers": Elliott on Roads and Streets, 557.

190 It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily laden freight trains are drawn cannot be considered a street railway.

Street-cars are little more than carriages for transportation of passengers, propelled over fixed tracks to which their wheels are adapted, and, as a convenient, comfortable, and economical mode of conveyance, their use has become well

nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner.

The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street.

We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the latter.

If there is any difference in the burden imposed upon the street it is in degree and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter-horse, which answered to our modern pack-mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served ¹⁹¹ all needed purposes; but, with the growth of inland commerce and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. c., which has provoked the admiration of the world, was entitled to commendation for its roadway, sixteen feet in width, constructed for the transportation of burdens, while the paths of eight feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved.

In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them by grade, width, and structure of roadbed to the carriage of freight.

Yet we are told, in effect, that, so far as modern methods are concerned, so far as ease, speed, and economy are involved, improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening the

road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure adapted to the transportation of freight adds an additional burden of a different character to the servitude, and cannot be tolerated without compensation to the abutting owner.

An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated.

We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the ¹⁹² public it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and, indeed, of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control; and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress or his right to light and air shall be interfered with.

The thirteenth subdivision of section 862 of the Municipal Government Act of this state authorizes the boards of trustees of municipalities of the sixth class (of which Santa Ana is one) "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam, or other power thereon . . . in the public streets." The world moves. Legislation in recent times has kept pace with the progress of the age.

The trend of judicial opinion, except where overshadowed and incrustated with *stare decisis*, is to a broader and more comprehensive view of the rights of the public in and to the

streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public and essential to its health, enjoyment, and progress.

¹⁹³ In *Paquet v. Mt. Tabor Street Ry. Co.*, 18 Or. 238, which was an action to enjoin a steam-motor railway company from constructing and operating its road upon a street in the city of Portland and upon a county road outside the city, abutting upon both of which the plaintiff owned land with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, C. J., in deciding the cause against plaintiff, said:

"The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out of the entire present beneficial interest of a private nature which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age."

McQuaid v. Portland etc. Ry. Co., 18 Or. 237, enunciates a like doctrine. In *Gaus & Sons Mfg. Co. v. St. Louis etc. R. R. Co.*, 118 Mo. 308, 35 Am. St. Rep. 706, the supreme court of Missouri held in substance that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners as in the case of property ¹⁹⁴ "taken or damaged" within the meaning of the constitution. The court said:

"When land is dedicated generally, and without restric-

tions, or condemned, for a public street in a town or city, the owner of the abutting lots, who secures the benefit of the street, and the persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use new modes of use may be adopted which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. . . . For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines, or movement of trains, defendant will be liable in an action for damages."

This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In *Barney v. Keokuk*, 94 U. S. 324, which was ejectment in the United States court for the district of Iowa, to recover certain premises within a public street in Keokuk occupied with railroad tracks, buildings, sheds, etc., upon error to the supreme court of the United States, that tribunal held that although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may by public authority be occupied by railway tracks without the consent of the adjacent proprietors and without compensation, whether the fee of the streets (as in that case) be in him or in a third person. The court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein: *Kucheman v. C. C. & D. Ry. Co.*, 46 Iowa, 366.

195 In New Jersey it is held: 1. That the legislature has power to authorize the use of a public highway for the purpose of a railway; 2. That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit; 3. The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands, as is contemplated by their constitution; 4. That the easement of the highway is in the public, although the fee is

practically in the adjacent owner. "It is the easement only which is appropriated, and no right or title of the owner is interfered with": *Morris etc. R. R. Co. v. Mayor etc. of Newark*, 10 N. J. Eq. 352.

In *Spencer v. Point Pleasant etc. R. R. Co.*, 28 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the court used the following language:

"Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title or possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it, and to use it as a street, and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant, a mere easement, and it has taken nothing from the plaintiff, and, therefore, under West Virginia authorities referred to, she is entitled to no injunction."

In *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377, the supreme court of Illinois held that the public authorities who have the superintendence and control of the ¹⁸⁶ public roads may authorize travel on them by the means of a railroad, and where a railroad company has constructed its road upon and along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.

This being an action of ejectment to recover a specific piece or parcel of land, and it appearing from the stipulation of the parties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property other than to such public street, within the purview of section 14 of article I of the constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in *Southern Pac. R. R. Co. v. Reed*, 41 Cal. 256, and *Muller v. Southern Pac. Br.*

Ry. Co., 83 Cal. 240, and it does not necessarily follow that ejectment will lie if the facts set out in the answer are true.

The cases above quoted were to recover damages. The cases of *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 203, and *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street without valid license from any authorized body.

The rule as defined in *Mahon v. San Rafael T. Co.*, 49 Cal. 270, is regarded as the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disseisin."

In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, ¹⁹⁷ or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise."

The action of ejectment is a possessory action in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Any thing which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment.

The case of *Redfield v. Utica etc. R. R. Co.*, 25 Barb. 54, is on all fours with the present case, and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie; intimating, but without deciding, that trespass was in such a case the proper remedy. *Edwardsville R. R. Co. v. Sawyer*, 92 Ill. 377, is to like effect.

The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do, or may, the public buildings of the municipality.

A writ of restitution which should put the plaintiff in pos-

session of the street except as one of the public would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A to be placed in possession of real property, subject to the possession of B, is an absurdity.

Where A enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202, and in *Finch v. Riverside etc. Ry. Co.*, 87 Cal. 597. This rule proceeds upon the theory that as defendant does not justify under one having a right to possession, it matters not as to him ¹⁹⁸ that another than the plaintiff may have a better right than either of the parties to the action.

A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses.

So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant.

The judgment is reversed, and the court below directed to overrule the demurrer to defendant's second defense set out in his answer.

Neither Chief Justice BEATTY nor Justice DE HAVEN participated in the foregoing decision.

MUNICIPAL CORPORATIONS—USE OF STREETS FOR RAILWAY PURPOSES—SERVITUDES—ABUTTING OWNERS.—A public street may be applied to all purposes not subversive of its proper use, or inconsistent with the uses contemplated in its dedication, grant, or condemnation. An abutting owner can complain only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street: *Gaus etc. Mfg. Co. v. St. Louis etc.*

R. R. Co., 113 Mo. 308; 35 Am. St. Rep. 706. The building and operating of a horse railway in the streets of a city are, by the great weight of authority, regarded merely as an extension of the ordinary uses to which the streets have been dedicated, and not the imposition of any new servitude for which the abutting owner is entitled to additional compensation. But the construction and operation of a railroad operated by horse-power, on a street, for the purpose of transporting freight cars from the terminus of one railroad to another, are an imposition of an additional burden, and entitle the abutting lotowners to compensation: See monographic note to *Vanderlip v. City of Grand Rapids*, 16 Am. St. Rep. 613, showing what is a taking of property for public use. The authorized use of a public street for street railroad purposes, no matter what the motor power may be, is not the imposition of an additional servitude, and does not entitle the abutting landowners along the street to compensation for such use: *Rafferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763. The construction of a railway on a public street which injuriously affects an adjacent owner by interfering with the access to or drainage from his property or the exclusion of light and air therefrom, is an additional servitude for which he may recover damages. See note to *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 35 Am. St. Rep. 712.

MUNICIPAL CORPORATIONS—POWER TO AUTHORIZE USE OF STREETS FOR RAILWAY PURPOSES.—A municipal corporation empowered by charter may authorize the use of streets for railway purposes, and an ordinance giving such authority has the force and effect of a state statute: See note to *Mayor of Houston v. Houston City etc. Ry. Co.*, 29 Am. St. Rep. 690. The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage: *Chicago etc. R. R. Co. v. Quincy*, 136 Ill. 563; 29 Am. St. Rep. 334.

ROGERS v. CADY.

[104 CALIFORNIA, 288.]

JUDICIAL NOTICE—DESCRIPTION OF LANDS.—If lands are clearly and distinctly described by the complaint in a judicial proceeding by reference to the section, township, and range of the United States government survey, the court must take judicial notice of the county in which they are situated, without any evidence on that point. This matter must be determined by the court in the same manner as a legal proposition, and cannot be made an "issue" between the parties to be determined by the court in each case upon conflicting evidence presented in that case.

JUDGMENT—IMPEACHMENT OF, FOR WANT OF JURISDICTION OF SUBJECT MATTER—ESTOPPEL.—A judgment may always be impeached for want of jurisdiction of the subject matter appearing upon the face of the judgment. Hence, a judgment foreclosing a mortgage of lands particularly described by reference to the section, township, and range of the government survey, and which judgment further erroneously recites that such lands are situated in the county in which the foreclosure action was brought, does not estop the judgment debtor, when the judgment is sought to be enforced, from asserting in an injunction suit to restrain a sale that the mortgaged premises are situated in another

county, and that the court was without jurisdiction to render such judgment.

JUDGMENT — CONSTRUCTION OF — ERRONEOUS RECITAL. — In construing a judgment which particularly describes lands by reference to the section, township, and range of the government survey, but which contains an erroneous recital as to the county in which they are situated, such recital must yield to the particular description.

JUDGMENT OF FORECLOSURE IS VOID, WHEN. — Under the constitutional provision requiring an action for the foreclosure of a mortgage to be commenced in the county in which the mortgaged premises, or some part thereof, are situated, a judgment in a suit commenced in another county is without jurisdiction and void.

JUDGMENT — EFFECT OF DELAY IN ENFORCING. — One who does not attempt to enforce a judgment until more than three years have elapsed after its entry ought not to complain if, in the mean time, he has lost any rights by reason of his inaction.

Shinn & Shinn and S. Solon Holl, for the appellants.

Spencer & Raker, for the respondent.

220 HARRISON, J. In 1884 the plaintiff executed to one Stanton a mortgage upon certain lands which are situate in Shasta county, but which were described in the mortgage as being in Lassen county, and the mortgage was recorded in Lassen county. In 1889 an action was commenced in Lassen county by the defendant Russell, as administrator of Stanton, to foreclose the mortgage, and in the complaint in this action the property sought to be foreclosed was described as follows: "The southeast quarter of northwest quarter, and lots 1 and 2 in section 31, township 37 north, range 6 east, Mount Diablo base and meridian, containing 116 $\frac{27}{100}$ acres, according to government surveys." Service of the summons was had upon the defendant in the action (plaintiff herein), and upon his failure to appear or answer the complaint his default was entered, and judgment rendered August 26, 1889, foreclosing the mortgage and directing a sale of the premises by the sheriff of Lassen county. An order of sale was issued upon this judgment October 5, 1892, by virtue of which the defendant Cady, as sheriff of Lassen county, was proceeding to sell the premises, when the plaintiff instituted the present action to enjoin him from making such sale. The case was tried by the court, and judgment rendered in favor of the plaintiff as prayed for. A motion for a new trial was made and denied, and the defendant has appealed from both the judgment and order. It is urged in support of the 220 appeal that by the judgment in the foreclosure suit it was determined that the mortgaged premises are situated in Las-

assen county, and that by reason of this judgment the plaintiff therein is estopped from showing that said premises are not situated in that county.

The lands affected by the foreclosure proceedings are clearly and distinctly described in the complaint therein, and in the judgment by reference to the section and township of the government survey. The plaintiff was not required to introduce any evidence at the trial in support of his averment that these lands are situated in Shasta county. The county in which lands so described are situated is a matter within the judicial knowledge of the court, and is to be determined by it in the same manner as a legal proposition, and cannot be made an "issue" between the parties to be determined by the court in each case upon conflicting evidence presented in that case. For the purpose of informing itself, the court might inquire of others, or refer to books or documents, or any other source of information which it might deem authentic, but its action in this respect is not a part of the trial of issues in the action. Matters of which a court takes judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; and the failure or refusal of a trial court to take such notice does not prevent the appellate court from giving proper effect thereto: See *Hunter v. New York etc. R. R. Co.*, 116 N. Y. 615.

Every court, by virtue of its organization, takes judicial knowledge of the extent and boundaries of the territory within which it can exercise jurisdiction, as well as the subject matter over which jurisdiction has been conferred upon it. Section 1875 of the Code of Civil Procedure declares: "Courts take judicial notice of the following facts: . . . 2. Whatever is established by law; 3. Public and private official acts of the legislative, executive, and judicial departments of this state, and of the United States."

The boundaries of Lassen county are "established by law" (Pol. Code, sec. 3912); and the government surveys of the public lands are "public, official acts of the executive department of the United States," and are matters of official record. It was therefore a matter for the court to determine, either from the personal knowledge of the judge, or from an examination by him of those records, whether any of the sections in township 37 north, range 6 east, Mount Diablo meridian, were situated in Lassen county or not: *Smither v. Flourney*, 47 Ala. 348; *Devine v. Burleson*, 35 Neb. 238; *Peo-*

ple v. Wood, 131 N. Y. 617; *Fackler v. Wright*, 86 Cal. 210; *Cole v. Segraves*, 88 Cal. 103.

The judgment in the foreclosure proceedings did not estop the plaintiff herein from asserting that the mortgaged premises are situated in Shasta county. That judgment merely declared that the plaintiff herein had mortgaged "the south-east quarter of northwest quarter, and lots one and two in section 31, township 37 north, range 6 east, Mount Diablo base and meridian, containing $116\frac{27}{100}$ acres, according to government surveys." In view of the fact that the court below, as well as this court, takes judicial knowledge that these sections are not within Lassen county, the further recital in the judgment that they are "situated in the county of Lassen" may be likened to a false call in a deed of conveyance. The lands which the court adjudged had been mortgaged were the designated sections, and the further inconsistent declaration by it that they are situated in Lassen county must yield to the determination of their particular situation.

Even if the language used by the court could be regarded as an express adjudication that the lands are within Lassen county, it would not estop the plaintiff from asserting that the court was without jurisdiction to render such judgment. The judgment of a court may always be impeached for want of jurisdiction, and when the judgment is upon a subject matter over which the court could, under no circumstances, have any jurisdiction, the objection may be taken at any time when ²⁹³ such judgment is invoked. A judgment of one of the former district courts in this state, admitting a will to probate, or a judgment of one of the present superior courts in this state, convicting a person of smuggling or enjoining a defendant from infringing a copyright, would have no validity under any circumstances, for the reason that the subject matter of such judgment was never within the jurisdiction of the court. There is no occasion in the present case to invoke a presumption of jurisdiction from the fact of its exercise. The want of jurisdiction appears upon the face of the judgment. By section 5 of article VI of the constitution an action for the foreclosure of a mortgage upon lands in Shasta county could not be commenced in the superior court of Lassen county, and when it appeared from the description of the lands set forth in the complaint that they were not within Lassen county, the proceeding should have

been dismissed: *Fritts v. Camp*, 94 Cal. 393. A court cannot, by any decision that it may make, either implied or direct, acquire jurisdiction over a subject matter that has been denied to it by the constitution, and whenever it appears upon the face of a judgment that it was rendered upon a subject over which the court could have no jurisdiction such judgment has no validity. The constitution has denied to the superior court of Lassen county any jurisdiction over the subject matter of the foreclosure proceedings, and as that court never had any jurisdiction to entertain the action, its determination upon any question arising in this proceeding cannot have any authority. There are certain cases in which the jurisdiction of a court depends upon the existence of some *quasi* jurisdictional fact necessary to be proven in order to authorize the court to act, and which it must itself determine from evidence before it can have jurisdiction to determine the controversy. *Brittain v. Kinnaird*, 1 Brod. & B. 432, is a leading illustration of this principle; and in *Noble v. Union River Logging R. R. Co.*, 147 U. S. 174, may be found reference to a number of cases of the same character; ²⁹² but the present case does not fall within this principle, for the reason that, as above seen, there was no question of fact to be determined by the trial court. When the subject matter upon which the jurisdiction of a court rests is limited by the constitution the court looks to that instrument for its jurisdiction, and cannot, by its mere decision, acquire jurisdiction over a matter therein denied to it.

The plaintiff herein did not take any step in the foreclosure proceedings which could be regarded as an estoppel on his part, or a waiver of his right to object to the jurisdiction of the court. The first step taken by him was to make this objection, and he made it as soon as the plaintiff attempted to enforce the judgment. As the plaintiff did not attempt to enforce the judgment until more than three years had elapsed after its entry he ought not to complain if, in the mean time, he has lost any rights by reason of his inaction.

The judgment and order are affirmed.

VAN FLEET, J., and GAROUTTE, J., concurred.

A COURT WILL TAKE JUDICIAL NOTICE in what county land is situated which is described as lying in a certain township and range: See monographic note to *Lanfear v. Mestier*, 89 Am. Dec. 677, on judicial notice.

JUDGMENT—WANT OF JURISDICTION.—A want of jurisdiction, either of the person or subject matter, appearing upon the face of the record, can be taken advantage of at any time and in any court where the conclusiveness of the judgment or decree is the subject of judicial inquiry: *Wall v. Wall*, 123 Pa. St. 545; 10 Am. St. Rep. 549, and note; monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 103-119, discussing collateral attacks upon judgments.

JUDGMENT IS NOT ESTOPPEL, WHEN.—A decree rendered without jurisdiction cannot bind or estop any one, and may be collaterally attacked, whenever and wherever it may be interposed, in any action: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and note; monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 103-119, discussing collateral attacks upon judgments.

JUDGMENT AT LAW.—EQUITY WILL SET ASIDE a judgment at law for fraud or mistake only in clear cases and when the relator is without fault, and has proceeded without unreasonable delay after the discovery of the fraud or mistake: *English v. Aldrich*, 132 Ind. 500; 32 Am. St. Rep. 270.

VISALIA GAS AND ELECTRIC LIGHT CO. v. SIMS.

[104 CALIFORNIA, 323.]

CONTRACTS—CONSIDERATION OF LEASE—DETRIMENT TO LESSOR.—The consideration for a lease may as well consist in detriment to the lessor as in profit to the lessee. Hence, if the possession of a company's electric light and gas plant, and the use thereof, are transferred by a lease for two years, under which the lessee is to take possession, manage, control, and operate the property, and to pay the company every three months during the term all the receipts of the business, less all necessary charges and expenses, the contract is supported by a sufficient consideration, though the lessee is not benefited by the contract.

CORPORATIONS—CONTRACT ULTRA VIRES—PUBLIC POLICY.—If a municipal corporation grants to an electric light and gas company a franchise to operate its works, and to supply the inhabitants of the city with gas and electricity, it is bound to operate its works, and has no power to lease them to a third party for a period of years. Such a contract, if made, is *ultra vires* and void as against public policy.

CORPORATIONS—VOID CONTRACT—RELIEF—PLEADING—ESTOPPEL.—A court will not relieve either party to a contract with a corporation, which is not only *ultra vires*, but also void as against public policy, and performance of the contract by one of the parties will not estop the other from pleading its invalidity.

CORPORATIONS—ACCOUNTING FOR MONEY OR PROPERTY RECEIVED UNDER VOID CONTRACT—LESSEES.—While a corporation is liable to account for money or property received by it under a void contract, the rule does not apply to a lessee of the corporation whose lease is void, and who is found to have made nothing from the lease.

W. H. H. Hart, Aylett R. Cotton, and Nowlin & Fassett, for the appellants.

Bradley & Farnsworth, for the respondent.

§ 228 TEMPLE, C. The complaint charges that plaintiff leased to one Lynch, June 24, 1887, certain premises, including the plant of the electric light and gas company, for the term of two years from June 1, 1887. That Lynch agreed to take possession, manage, control, and operate the same, and to pay said company every three months during the term all the receipts of said gas and electric light business, after paying all necessary charges and expenses incurred in carrying on said business; and further agreed that the amount so paid should be sufficient to enable it to pay an annual dividend of its stockholders of five per cent upon its capital stock of twenty-eight thousand dollars, and, in case of deficiency, he would pay to such company every three months such further sums as would enable it to pay such dividend.

That defendants became sureties by signing an agreement indorsed on said agreement of lease, whereby they agreed if said Lynch failed to pay plaintiff such sums, or any sums which might be due, they would pay the same.

That Lynch took possession of the demised property and retained it until June 1, 1889, without paying plaintiff any sums of money as rents or receipts from said business.

That on the 1st of June, 1888, there became due plaintiff on said agreement fourteen hundred dollars, and on the 1st of June, 1889, the sum of fourteen hundred dollars; that no part of said sum has been paid.

The answer contains several defenses: 1. It denies that Lynch held possession for two years, and avers that plaintiff ejected him August 1, 1888; 2. There was no consideration for Lynch's agreement; 3. No consideration for the agreement to pay sums additional to the receipts from the business; 4. Receipts did not exceed the expenses; there was, therefore, a failure of § 229 consideration; 5. The contract of defendants was without consideration; 6. Failure of consideration for sureties' agreement; 7. Want of consideration again pleaded; 8. Plaintiff was incorporated to furnish gas and electricity to the inhabitants of Visalia for illuminating purposes; the alleged lease was therefore *ultra vires*; 9. The contract is *ultra vires* and against public policy.

A defense by amendment sets up the incorporation of plaintiff for specific purposes of furnishing light to the inhabitants, an ordinance procured by it from the city authorizing it to lay pipes in the streets and to erect masts for electric lights, the acceptance of the franchise, the construc-

tion of the works, the duty of the corporation to furnish gas and electric lights, in consideration of the privileges, and its undertaking that the works shall not constitute a nuisance, and again charges that the lease to Lynch was against public policy and void.

The findings and judgment are for plaintiff. Nevertheless, the court found that the receipts from the demised property were insufficient to pay running expenses.

That plaintiff was incorporated for the purpose of manufacturing coal gas and to sell such gas and electricity to the inhabitants of Visalia, and was by ordinance authorized to lay down and maintain gaspipes in the streets of said city, and through such pipes supply the inhabitants with gas; and to erect and maintain poles, masts, and wires to conduct electricity through said city. That prior to the making of said agreement it had accepted said franchise, and had laid its pipes in the streets of said city, and erected the poles, masts, and wires, and when the lease was made was in the possession of and using said plant and said franchises.

That among other restrictions imposed by such ordinance was the requirement that the works should be so constructed and used as not to become a nuisance. That no authority was conferred by said ordinance upon plaintiff to lease or assign such franchise.

1. Defendants contend that the lease and their undertaking ²³⁰ as sureties are void, because not supported by a valuable consideration.

The lease is supposed to be unsupported by a valuable consideration, because it in terms binds the lessee to pay over to the lessor all moneys received over and above running expenses. Therefore, it is said, there was no chance for a profit to the lessee. His agreement to take care of and manage the works and to guarantee a certain profit was gratuitous. The contract bound him to do it for nothing.

We need not inquire what induced Lynch to enter into a contract so one sided. He may have had a motive which is not apparent. As matter of law, however, the contract was supported by a sufficient consideration. This may as well consist in detriment to the lessor as in profit to the lessee. By the contract he acquired possession of the property for two years, and induced plaintiff to forego, for the same period, its possession and use. Who can say that plaintiff could

not and would not have realized a profit from the property but for the lease?

2. The main defense, however, is that the lease is *ultra vires* and against public policy.

The real question presented is not that the lease is *ultra vires* as to the corporation, but that plaintiff, having availed itself of the franchise granted it by the city of Visalia, it became its legal duty to operate its gas and electric works, and to supply the inhabitants with gas and electricity, and it was, therefore, against public policy to lease those works and privileges to Lynch, and thus disable itself for the time from performing its duty.

This proposition is clearly maintained in *Thomas v. Railroad Co.*, 101 U. S. 71. That was the case of a lease of a railroad and franchise. The court said, speaking through Mr. Justice Miller:

“Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due ²²¹ performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes, is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in *York etc. R. R. Co. v. Winans*, 17 How. 30. . . . ‘This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature.’”

This case was cited and approved in *Green Bay etc. R. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, and in *Oregon Ry. etc. Co. v. Oregonian Ry. Co.*, 130 U. S. 1.

So, too, the customers are interested in having a responsible party to deal with. The city has provided such a party in its contract with the corporation, for such it has been held to be: *People v. Chicago Gas Trust Co.*, 130 Ill. 268; 17 Am. St. Rep. 319; *Gibbs v. Consolidated Gas Co.*, 130 U. S. 411.

The same conclusion is reached upon the principle that they cannot delegate functions and powers given to them. *Delegatus non potest delegare.*

*** The subject is extensively discussed in Morawetz on Private Corporations, sections 656, 1114, 1116, and 1129. In the last section he says that the principle applies to gas companies. The author's conclusions accord with the cases above cited. In fact, respondent has furnished no cases to the contrary.

It is said, however, that when a contract which was *ultra vires* has been performed on one part, the other is then estopped to plead that the contract was *ultra vires*. Here, however, the contract was void, because against public policy. In such cases courts will not give relief to either party.

Respondent contends that the rule is different as to corporations, and some cases seem to sustain the claim. It is impossible to see why there should be a difference in such cases because one party is a corporation. It is sometimes said, however, that a contract of a corporation is against public policy when it is simply *ultra vires*, because it is against public policy that a corporation should assume to exercise powers not granted. In such case it is simply an executed *ultra vires* contract. But it may also be an attempt to do that which is unlawful without reference to the corporate franchise, a contract which would be unlawful in a natural person. In such case the contract of the corporation is subject to the same rule which obtains in the case of individuals.

But it would make no difference here. The lessee, it is found, made nothing from the lease. The rule is the same that it would have been had the corporation been sued.

Says Morawetz on Private Corporations, section 715: "If money or property is given to a corporation under a contract which is void because the agent assuming to represent the corporation in the transaction had no authority to bind it, the corporation is liable to account for the money or other

property received. . . . Thus, in *Burges and Stocks case*, 2 Johns. & H. 441, the directors of a life assurance company had issued policies of ²²² marine insurance, and applied the premiums to the use of the company. Upon winding up the company, the holders of the policies were held not to be entitled to prove for losses, but were allowed the amount of the premiums paid. Vice-Chancellor Page-Wood said: 'They had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered even at law as money had and received.'"

So, he says, a corporation cannot be charged with a loan of money made by its directors without authority, but, if any portion of the money has been applied to the proper uses of the company, it may be held liable to that extent at least. It is said: "The liability of the company does not, in such case, arise from the contract entered into by the directors, but from the equitable right of the lender to recover his money, which has gone to swell the company's assets."

I think this is the principle which underlies most of the cases upon this subject, although forced to admit that some are not consistent with it.

This action is on the contract to recover an amount of money which the lessee guaranteed the property would pay, but which it did not. It is not for any amount of benefit which he received from the contract. It is found that he received no benefit upon it. The fact that there was a consideration which would prevent the contract from being a *nudum pactum* for the want of it does not make a case of benefits to be paid for where a contract is *ultra vires*. And the contract being against public policy should not be enforced.

I recommend that the judgment be set aside, and judgment on the findings ordered for defendants.

HAYNES, C., and SEARLS, C., concurred.

²²⁴ For the reasons given in the foregoing opinion the judgment is set aside, and judgment on the findings ordered for defendants. GAROUTTE, J., HARRISON, J., VAN FLEET, J.

Hearing in Bank denied.

CONTRACTS—CONSIDERATION.—Any damage, or any suspension of a right, or any liability to a loss occasioned to one by the promise of another, is a sufficient consideration for such promise, and will make it binding, though no actual benefit accrues to the promisor: *Mascolo v. Montesanto*, 61 Conn. 50; 29 Am. St. Rep. 170.

CORPORATION—TRANSFER OF FRANCHISE—ULTRA VIRES.—A corporation cannot transfer its franchise without the authority of the sovereign grantor. Such a contract would be *ultra vires*, because beyond its corporate powers, and could not become lawful and valid by being carried into execution. The proper remedy of an aggrieved party is to disaffirm such a contract when made, and sue to recover as upon a *quantum meruit* the value of what the defendant has actually received the benefit of: *Brunswick Gas Light Co. v. United Gas etc. Co.*, 85 Me. 532; 35 Am. St. Rep. 385, and monographic note thereto discussing the right to transfer public franchises.

EQUITY—CORPORATIONS—ULTRA VIRES CONTRACTS—LIABILITY.—As between parties *in pari delicto*, standing upon an equal footing, no relief will be given by the courts. In such a case the parties will be left in the position where they have knowingly and willfully placed themselves: See monographic note to *Harper v. Harper*, 7 Am. St. Rep. 587. If a corporation, in excess of its powers, receives money, which is to be returned if a certain additional amount is not received in a given time, and the condition is broken, an action will lie to recover the amount. A corporation is liable on a *quantum meruit* on a contract *ultra vires*, and broken by the other party: See note to *Greenville etc. Co. v. Planters' etc. Co.*, 35 Am. St. Rep. 685.

FEALEY v. FEALEY.

[104 CALIFORNIA, 354.]

ORDER SETTING APART HOMESTEAD TO WIDOW—ACTION TO ANNUL—CONCLUSIVENESS OF—FRAUD.—If the complaint in an action to annul an order setting apart a homestead to the widow of a deceased husband, out of his estate, merely sets forth the falsity of the widow's statement made in her petition for the order, and again repeated in her testimony upon the hearing thereof, concerning the nature of the title to the land set apart, it does not state a cause of action, as the question of title was necessarily involved in the homestead proceeding, and was concluded thereby, the plaintiff having had notice of that proceeding, and not being prevented by fraud from appearing therein and contesting it.

JUDGMENT—EQUITY WILL SET ASIDE OR ANNUL FOR FRAUD, WHEN.—It is only for fraud extrinsic or collateral to the matter in issue, and tried in an action, and not for a fraud in a matter upon which the judgment was rendered, that a court of equity will set aside or annul a judgment for fraud. This rule is based upon the principle that there must be an end of litigation.

JUDGMENT—CONCLUSIVENESS AND EFFECT OF ORDER SETTING APART HOMESTEAD TO WIDOW OF DECEDENT.—An order setting apart a homestead to the widow of a decedent, no homestead having been declared during the lifetime of the deceased, operates to vest in her a title to the land set apart out of the community property. It is in the nature of a

judgment *in rem*, is conclusive upon all persons interested in the estate, if the court has jurisdiction to pronounce it, and can be successfully attacked in equity only upon the same grounds that a judgment *in personam* may be annulled.

RES JUDICATA—HOMESTEAD—COMMUNITY PROPERTY.—In a proceeding to set apart a homestead to the widow of a decedent, the question as to whether the land set apart to her is or is not community property is necessarily put in issue, and is concluded by the judgment.

JUDGMENT SETTING APART HOMESTEAD TO WIDOW—CONCLUSIVENESS OF, AS TO INCOMPETENT HEIR AND GENERAL GUARDIAN.—It is the duty of a guardian to protect the rights of his ward. Hence, if a person dies leaving a widow and his mother as his only heirs at law, and the widow obtains an order setting apart a homestead to her out of the property of the decedent, the mother, previous to such order, having been adjudged an incompetent person for whom a general guardian was appointed, and the guardian having had knowledge of the homestead proceeding, the judgment in that proceeding is conclusive as to the mother in an action by her to annul the order.

Gesford & Thompson, for the appellant.

A. J. Hull, for the respondent.

• **357** DE HAVEN, J. The defendant is the widow of William Fealey, deceased, and this action is brought for the purpose of annulling an order of the superior court of Napa county, setting apart to her a homestead out of the estate of said deceased. The complaint alleges that the property so set apart was the separate property of the deceased, and that the defendant here, with knowledge of this fact and for the purpose of deceiving the court in which the administration proceedings were pending, filed a petition in which she falsely alleged that such property was community property, and asked that the same be set apart to her absolutely as a homestead; and that, upon the hearing of the application, she was a witness, and testified that the statement in her petition in relation to the character or title of such property was true. The complaint further alleges that this testimony was willfully false, and was given by the defendant for the purpose of deceiving the court; and that by reason thereof the court was in fact misled and deceived, and induced to make the order granting the prayer of defendant's petition, and to set apart to her the land therein described as a homestead for her sole use and benefit. The order is set out in the complaint, and it appears from its recitals that the court found "from the papers on file in the said matter and other evidence **358** introduced" that the property so set apart was community property.

The complaint also shows that the deceased died intestate, and that the plaintiff, who is his mother, and the defendant are his only heirs at law; and it is further shown that prior to the making of the order sought to be annulled the plaintiff was adjudged an incompetent person, and a general guardian—the same person who brings the present action in her behalf—had been appointed to manage her estate. The complaint alleges that this guardian had actual notice of the proceeding upon the part of the defendant to obtain the order setting apart the homestead, and that he consulted certain lawyers in relation to the rights of plaintiff, and upon the facts which he laid before them was by them advised that the defendant was entitled to the order asked for in her petition, and that it would subject the plaintiff to useless expense to contest the right of defendant to have the land therein described set apart to her absolutely; but in this connection the complaint alleges that said guardian did not learn the true facts concerning the title to such land until after the entry of the order here assailed. The complaint also contains an averment that there was community property belonging to the estate of the deceased Fealey out of which a homestead could have been set apart, and that the existence of this property was fraudulently concealed by the defendant. This latter averment adds no strength to the complaint, and need not be further considered by us.

The defendant interposed a general demurrer to the complaint, which was overruled by the court, and, the defendant declining to answer, judgment was rendered in favor of the plaintiff, and in accordance with the prayer of the complaint. This ruling of the court presents the only question arising upon this appeal.

The demurrer to the complaint ought to have been sustained. The fraud which is set forth as the basis of the plaintiff's cause of action relates to the alleged ³⁵⁹ falsity of defendant's statement made in her petition for the order setting aside the homestead, and again repeated in her testimony upon the hearing of such petition, concerning the nature of the title to the land set apart to her as a homestead; but the question of title thus presented and sought to be litigated in this action was necessarily involved in the proceeding to set apart the homestead, and the order or judgment of the court therein was a determination that the allegation of defendant's petition in regard to the nature of the title to the

land so set apart was true, and that her testimony relating to the same matter given upon the trial of that proceeding was also true. The plaintiff had notice of the pendency of that proceeding, and no fraud was practiced upon her by which she was prevented from appearing therein and contesting the allegation of defendant's petition, or showing that the testimony given by her was unworthy of credit. Under these circumstances that judgment is conclusive upon the plaintiff, and she cannot be permitted to bring into litigation the same matters therein involved and settled by that judgment. The case made by the complaint here falls exactly within the rule declared in *United States v. Throckmorton*, 98 U. S. 61; *Griffith's Estate*, 84 Cal. 113; and *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159.

In the first of these cases it was said by Mr. Justice Miller, in delivering the opinion of the court, that "the acts for which a court of equity will on account of fraud set aside or annul a judgment between the same parties, rendered by a court of competent jurisdiction, have relation to fraud extrinsic or collateral to the matter tried by the first court, and not to a fraud in a matter upon which the decree was rendered." And in *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, the question was very carefully considered, and this court announced the same rule, saying: "The reason of this rule is that there must be an end to litigation, and when parties have once submitted a matter, or have had an opportunity ³⁶⁰ of submitting it for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. . . . Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once it could be done again and again, *ad infinitum*."

These cases are, we think, conclusive of the one now before us. So far as concerns the question here presented there is no difference in principle in the nature of the judgments under review in the above-cited cases and the order here

sought to be annulled. The order setting apart the homestead to defendant (no homestead having been declared during the lifetime of the deceased) operated to vest in the defendant a title to the land so set apart: *Estate of Boland*, 43 Cal. 640; *Estate of Moore*, 96 Cal. 522; and such order was in the nature of a judgment *in rem*: *Kearney v. Kearney*, 72 Cal. 591; and the court, having jurisdiction to pronounce it, it is conclusive upon plaintiff and all persons interested in the estate, and can only be successfully attacked in equity upon the same grounds upon which a judgment *in personam* may be annulled.

The conclusion we have reached in this case is not at all in conflict with *Wickersham v. Comerford*, 96 Cal. 433. The action in that case was brought by a creditor of the deceased to annul the order of the probate court setting apart a homestead to the widow of the deceased, the complaint alleging in substance that prior to the death of deceased he and his wife entered into a written agreement for a separation and division of the community property, and that such agreement was completely ³⁶¹ performed, and that deceased and his wife were at the time of his death living separate and apart, in accordance with the terms of said agreement. Under this state of facts the widow was not entitled to a homestead out of the estate of her deceased husband: *Estate of Noah*, 73 Cal. 583; 2 Am. St. Rep. 829. But the complaint in that action further alleged that in the petition which the widow filed, asking the court to set apart such homestead for her use, she "willfully suppressed and concealed from the court" the fact of the existence of the agreement made between herself and husband for a separation, and that she and the deceased were not living together as husband and wife at the time of his death, and that such concealment was made for the purpose of deceiving the court. It was held in that case that this omission being willful, and relating as it did to a material fact which ought to have been brought to the attention of the court and submitted to its judgment, was such a fraudulent concealment as would justify a court of equity in annulling the order setting apart the homestead; but it is clear that the fraud which was made the basis of the action and judgment in that case was extrinsic to the judgment or order annulled. In the original proceeding for a homestead under review in that case the court did not even indirectly pass upon the question of the existence or nonexistence of the agreement

for separation, and that matter not being before the court, was not concluded by the judgment or order in that proceeding; but, as we have seen, the direct question sought to be litigated here, viz., whether the land set apart to defendant as a homestead was or was not community property, was put in issue in the homestead proceeding, resulting in the order here assailed; and the court, upon the evidence submitted to it at the time of making that order, found the fact adversely to the plaintiff's present contention, and this marks the important distinction between the present and the case of *Wickersham v. Comerford*, 96 Cal. 433.

Nor can the case of *Bergin v. Haight*, 99 Cal. 52, be regarded as an authority sustaining the complaint in this action. There the court expressly held that there was "nothing upon the face of the proceedings to indicate a fraudulent collusion between the administrator and his attorney," and that "there was no opportunity to determine any issue of fraud in the probate court." This being so, it was necessarily held that the fraud alleged and found in that action was extrinsic and collateral to the questions determined by the probate court when it confirmed the sale of the land in controversy there.

The case of *Dunlap v. Steere*, 92 Cal. 344, 27 Am. St. Rep. 143, comes nearer supporting the contention of plaintiff, and yet does not do so. In that case the plaintiff was only constructively served with summons, and had no actual notice of the pendency of the action in which the judgment there annulled was given, and, referring to the rule above quoted from *United States v. Throckmorton*, 98 U.S. 61, to the effect that a judgment will not be set aside for false testimony given in relation to a matter upon which the judgment was rendered, it was held that such rule was only applicable "where the former judgment was the result of a trial between the parties, or where the one against whom the judgment was rendered had actual notice of the pendency of the action, and neglected to submit his proofs." It is alleged in the complaint here that the plaintiff was an incompetent person when the order sought to be annulled was made, and so it may be said that in one sense she had no personal knowledge of its pendency or comprehension of the matters involved in that proceeding; but it also appears from the complaint that her general guardian did have such knowledge, and, as the law devolved upon him the duty of protect-

ing her rights in that proceeding, the case is not within the reason of the rule declared in *Dunlap v. Steere*, 92 Cal. 344; 27 Am. St. Rep. 143. The plaintiff did have all the notice which it was possible for her to have, and had the full benefit of all the safeguards which the law deemed necessary for her protection in that proceeding, or which the law deems necessary for the protection of any incompetent person from unjust or fraudulent judgments.

Judgment reversed, with directions to the superior court to sustain the demurrer to the complaint.

HARRISON, J., and VAN FLEET, J., concurred.

RELIEF IN EQUITY FROM JUDGMENT AT LAW.—To entitle a party to relief in equity on the ground of fraud from a judgment entered against him he must establish "that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy": See monographic note to *Oliver v. Pray*, 19 Am. Dec. 603, on the power of equity to relieve against a judgment at law; *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159, and note.

The question as to what constitutes fraud or imposition upon the court in a petition by a widow to have set apart to her a homestead out of the property of her deceased husband was considered in *Wickersham v. Comerford*, 104 Cal. 494. This was an action to vacate and annul an order setting apart such a homestead to Mrs. Comerford. The trial court found that the allegations in the petition of Mrs. Comerford for the homestead were not fraudulent, and that the court was not induced to make the order by reason of any false or fraudulent representations therein contained, or by any concealment of facts from it by her or by any one on her behalf. This finding was challenged by the appellant as not supported by the evidence, but the supreme court held that the evidence before the trial court justified the finding and said, per Harrison, J.: "It was necessary for the plaintiff to establish by clear and indubitable proof, to the satisfaction of the superior court, that the order setting apart the homestead had been obtained through some fraud practiced upon that court by the defendant. It was not sufficient to show that she had made the application under an erroneous view of her rights in the premises, or that upon the facts presented in her petition, or at the hearing, the court had mistaken the law applicable thereto. She cannot be charged with fraud or any fraudulent imposition upon the court for merely failing to state in her petition any facts tending to show that the petition ought not to be granted, unless it is made to appear that she knew the import of these facts, and that they were willfully suppressed by her with the intention of deceiving the court and thereby inducing it to grant the petition. Tested by these rules the plaintiff failed to establish his right to the relief sought. It was shown that after the death of her husband Mrs. Comerford was advised by her attorney that she was entitled to have the property set apart to her as a homestead, and the petition therefor was prepared by him and signed by her and presented to the court. It is not claimed that this advice was not given in good faith, or that the facts set forth in the petition are not correctly stated; and the most that can be said is that the attorney was mistaken in his views of the law. It is claimed,

however, that the petitioner 'concealed' from the court the fact that 'articles of separation' had been entered into between her and her husband, under which they had divided their property, and were living separate and apart from each other. It was not shown, however, that the legal effect of these articles of separation upon her right to a homestead out of the estate of her husband was ever called to the notice of the petitioner, or that she was advised in reference thereto, or that she had any purpose or motive in omitting to make mention thereof in her petition or at the hearing; and she cannot be charged with 'concealing' them from the court by her mere silence in reference to their existence. She is not to be charged with a fraudulent concealment of any fact unless she was under some obligation to disclose it, and the mere omission to make mention of the fact, in the absence of any knowledge or notice on her part that it was requisite to make such mention, falls far short of fraud." The judgment against the plaintiff was affirmed.

WICKERSHAM v. JOHNSTON.

[104 CALIFORNIA, 407.]

LAW OF FOREIGN COUNTRY.—The foreign law, as to questions raised in the courts of this state, must be assumed, in the absence of any evidence tending to show what that law is, to be the same there as here. This rule applies to England, as well as to sister states of the American union.

FOREIGN LAW MUST BE PLEADED AND PROVED.—A foreign law is a matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of. Therefore it must be pleaded and proved.

EXECUTORS AND ADMINISTRATORS—NEGOTIABLE INSTRUMENTS.—The executors of the estate of a deceased person have no authority to sell and transfer notes belonging to the deceased. They are assets of the estate which can be sold only under and by order of the probate court.

EXECUTORS AND ADMINISTRATORS—SALE OF CHoses IN ACTION.—Under the statute choses in action are to be sold in the same manner as other personal property.

EVIDENCE—JUDICIAL RECORDS—PROOF OF PROBATE OF FOREIGN WILL, HOW MADE TO BE EFFECTUAL.—A foreign judicial record of the probate of a will may be proved by a copy thereof, attested and certified as provided by statute, and is admissible in evidence, though, in the absence of proof of the foreign procedure being different from that of our own courts, it would be insufficient to support a right claimed under the will, unless an exemplified copy of the pleadings, petitions, or proceedings leading up to the order of admitting the will to probate and giving jurisdiction to make it is also introduced to make the record complete.

STATUTES—CONSTRUCTION—MEANING OF "ATTESTATION"—PROOF OF FOREIGN JUDICIAL RECORDS—EVIDENCE.—Section 1906 of the Code of Civil Procedure of California, providing how the judicial record of a foreign court may be proved refers to exemplified copies of an original record, and not to the original record itself. The word "copy" is included in the word "attestation" used in that section, and which is used in its secondary or technical sense, to denote the certification by the keeper of a record of the verity of a copy.

C. M. Wheeler and P. F. Hart, for the appellant.

Edward J. Ryan and J. N. Gillett, for the respondent.

410 MCFARLAND, J. The plaintiff brought three actions against the defendant, each upon a promissory note made by the defendant to one John Lancaster, since deceased, who was a British subject and a resident of England, where he died testate on the 21st of April, 1884. The three actions were, by the consent of parties and an order of the court, consolidated. The court rendered judgment for plaintiff for the amount of the principal and interest of said three notes, with costs, etc. Defendant appeals from the judgment.

The judgment of the lower court went upon the theory, founded upon the findings, that the two sons of the deceased, George Granville Lancaster and John Lancaster (Jr.), were appointed by the will of the deceased as the executors thereof, and qualified as such; and were also appointed "administrators of the personal estate" of the deceased John Lancaster; that the will of the deceased was duly probated in an English court; that by said will the said sons were also made residuary legatees; and that on November 15, 1880, the said sons, George and John, as such executors and administrators, and being the owners of said notes, "sold, transferred, and set over" the same to the plaintiff herein.

411 The main evidence in the case introduced by plaintiff is found in a certain commission to take the testimony of said George and John Lancaster, issued to John C. New, consul general of the United States at London, by which it was undertaken to prove all the foregoing facts as to the death of John Lancaster, deceased, the existence of the will, its probate, issuance of letters testamentary and letters of administration to the sons, etc. Many objections were made by appellant to various parts of the evidence contained in said commission; but we will assume for the present that the evidence contained in this commission sufficiently shows the facts above referred to. There was no evidence at all tending to show what the law was in the foreign country touching any of the questions which are raised here; and it must, therefore, be assumed that the law with respect to those matters was the same there as in California: *Norris v. Harris*, 15 Cal. 254; *Hickman v. Alpaugh*, 21 Cal. 226; *Hill v. Grigsby*, 32 Cal. 55; *Marsters v. Lash*, 61 Cal. 624; *Monroe v. Douglass*, 5 N. Y. 447; *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S.

445. This rule applies to England as well as to sister states of the American nation. In *Liverpool etc. Co. v. Phenix Ins. Co.*, 129 U. S. 445, the supreme court of the United States say: "The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved."

The alleged transfer or assignment of the said notes from the said George and John Lancaster was not by indorsement on the back of said notes, but consisted of a separate written instrument in which they recited that they had "bargained sold, and transferred" the said notes to the plaintiff herein, and that they "do hereby sell, transfer, and set over" the same to the plaintiff; and it is said in said instrument that they sell, etc., said notes "as executors of John Lancaster, ⁴¹² deceased, and as representing themselves and said estate," and the document is signed "John Lancaster, George Granville Lancaster." Now, waiving all other points, and assuming the law of England to be the same as that of California, the said John and George Lancaster had no authority to sell and transfer said notes to the plaintiff. They were assets of the estate of John Lancaster, deceased, and could be sold only under and by an order of the probate court. Section 1517 of the Code of Civil Procedure provides that "no sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter"; and the property involved here is not one of the exceptions. Section 1524 expressly provides that "choses in action may be sold in the same manner as other personal property": *Belloc v. Rogers*, 9 Cal. 128. The cases cited by respondent upon this point, such as *Weider v. Osborn*, 20 Or. 307; *Hough v. Bailey*, 32 Conn. 288, and *Marshall Co. v. Hanna*, 57 Iowa, 375, were cases arising under statutes which only provided that tangible personal property could not be sold, except by an order of the probate court. For this reason the judgment must be reversed.

The foregoing point is conclusive of this appeal; but, as the cause may be tried again, it is necessary to notice one or two other positions taken by appellant.

The evidence introduced by respondent to prove the probate of the will of said John Lancaster, deceased, consisted

of a copy of a judicial record of the probate division of her majesty's high court of justice, certified as correct by Charles John Middleton, registrar of said court, accompanied by the certificate of the judge of said court to the official position of Middleton as the custodian of its records and the genuineness of his signature, and also by a certificate of John C. New, United States consul general, to the genuineness of the signature of the said judge—all in accordance with the requirements of section 1906 of the Code of Civil Procedure. But appellant contends that said section refers ⁴¹⁸ only to an original record, and not to a copy. The section is as follows: "A judicial record of a foreign court may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and seal, or of the legal keeper of the record with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge, or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country." While the word "copy" is not expressly used in the section, it is clearly included in the language which is used. It is included in the word "attestation," and is necessarily contemplated throughout the entire section. The notion of an original judicial record requiring the attestations and certificates mentioned in the section is incongruous and not to be entertained. A record proves itself. The certificate and signature of an American consul in a judgment-book of an English court, in order to give it verity, would be a rare spectacle. It is not to be supposed that the legislature meant such a thing when express words to that effect were not used. In the absence of statutory provisions on this subject an original record itself is rarely produced as evidence, except when the cause is in the same court whose record it is: 1 Greenleaf on Evidence, sec. 502. In other cases the proof is by exemplification. In section 1906 the word "attestation" is evidently used in its secondary or technical sense—the certification by the keeper of a record of the verity of a copy. In Anderson's Law Dictionary a definition of "attest" is as follows: "To certify to the verity of a copy of a public docu-

ment." In Abbott's Law Dictionary it is said: "Attest is also the technical word by which, in the practice of many of the states, a ⁴¹⁴ certifying officer gives assurance to the verity of a copy": See, also, Black's Law Dictionary, under "attest." Moreover, that part of section 1905 which provides for proof of a judicial record of a sister state, and section 905 of the Revised Statutes of the United States, which provides for proof of judicial records of the states and territories, are both substantially the same as said section 1906 of the Code of Civil Procedure; in neither is the word "copy" used. But under those provisions it has been held that a certified copy is sufficient: *Low v. Burrows*, 12 Cal. 181; *Parks v. Williams*, 7 Cal. 247; *Ferguson v. Harwood*, 7 Cranch, 408. Some weight is attached by appellant to the fact that the next succeeding section—section 1907 of the Code of Civil Procedure—provides that a copy of a foreign judicial record is also admissible in evidence upon compliance with the provisions of that section. But evidently the stress of that section is not upon the word "copy," so as to distinguish it from original. Section 1906 having provided for a copy under attestation of the keeper of the record, accompanied by certain certificates of certain other officers, section 1907 provides that a copy may also be admitted, without the certificates of said officers, if it be accompanied by the oral testimony of a witness that he had compared the copy with the original, and that it was an exact transcript thereof, and also by certain other evidence required by said section. We are satisfied that a foreign judicial record may be proved by a copy thereof, attested and certified as provided by said section 1906 of the Code of Civil Procedure.

We think, however, that appellant is right in contending that the judicial record introduced by respondent in this case is entirely insufficient to support any right asserted under it by respondent. It includes merely a transcript of a short order of the foreign court, to the effect that on a certain day the will of Lancaster, deceased, was proved and registered, and that administration of the personal estate was granted to John and George Granville Lancaster, sons, and executors named ⁴¹⁵ in the will, who had been sworn to well and faithfully administer the same. It contains no previous proceedings upon which the order rested, no petition, no pleadings, no judgment-roll other than said order. This was not sufficient in the absence of proof of a procedure in the foreign

country different from that of our own. The pleadings, petitions, or proceedings which led up to the order and gave jurisdiction to make it, should have been introduced so as to have made the record complete: 2 Freeman on Judgments, sec. 603; *Young v. Rosenbaum*, 39 Cal. 646; *Mason v. Wolff*, 40 Cal. 249; *Harper v. Rowe*, 53 Cal. 234.

There are no other points necessary to be now noticed.

The judgment is reversed and the cause remanded for a new trial.

DE HAVEN, J., and FITZGERALD, J., concurred.

FOREIGN LAWS—PLEADING AND PROOF—PRESUMPTION.—Foreign laws will not be judicially noticed. They must be pleaded and proved as other facts. In the absence of proof the laws of another state are presumed to be the same as here: *Scroggin v. McClelland*, 37 Neb. 644; 40 Am. St. Rep. 520, and note. But the rule that foreign laws must be pleaded and proved like other facts is not applicable when they consist of mere matters of evidence: *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174; 38 Am. St. Rep. 536. The laws of each state are regarded as "foreign," and not "domestic," laws in the courts of the other states, and will not be judicially noticed, but must be proved: See monographic note to *State v. Twitty*, 11 Am. Dec. 782.

SALES BY EXECUTORS OR ADMINISTRATORS ARE VOID unless made by order of court or as authorized by law: *Ware v. Houghton*, 41 Miss. 370; 93 Am. Dec. 258, and note.

PROOF OF PROBATE OF FOREIGN WILL—JUDGMENT.—A certified copy of an authenticated copy of a will made in another state, and probated there, and admitted to probate and recorded in Mississippi, is competent evidence under the Mississippi statute: *Montgomery v. Mullikin*, 5 Smedes & M. 151; 43 Am. Dec. 507. An exemplified copy is the proper evidence to prove a judgment: *Lowry v. Cady*, 4 Vt. 504; 24 Am. Dec. 628.

IN RE ESTATE OF DOBBEL.

[104 CALIFORNIA, 482.]

INSURANCE—POLICY PAYABLE TO WIFE—SEPARATE PROPERTY—GIFT.—

A husband may lawfully give to his wife a policy of insurance upon his life, and, when made payable to her by name, it is her separate property, although the application is made by the husband and the premiums are paid with money of the community.

INSURANCE—POLICY PAYABLE TO WIFE—DESCENT—HEIRSHIP.—If a wife dies intestate before the death of her husband a policy of insurance in her name, being her separate property, is payable to her heirs at the time of her death, and her husband takes a one-third interest therein by virtue of his heirship to her separate property.

INSURANCE—POLICY PAYABLE TO WIFE—DELAY OF ADMINISTRATION—HUSBAND'S RIGHTS.—If the wife's estate at the time of her dying

intestate consists of a policy of insurance on her husband's life, in her name, delay in the administration and distribution of her estate until after the death of her husband cannot affect his title, or that of his estate, to a one-third interest in the policy and its proceeds when paid to her estate.

HUSBAND'S RIGHT IN WIFE'S ESTATE—ASSIGNABILITY—DESCENT—ADMINISTRATION.—The husband, as an heir of his wife, has an interest in her estate, which he may sell or assign, subject to the claims of administration thereon, or dispose of by will. If not so disposed of it passes to his heirs subject to administration.

George C. Ross and Henry W. Walker, for the appellants.

Edward F. Fitzpatrick, for the respondent.

⁴³⁴ **GAROUTTE, J.** This is an appeal from a decree of final distribution, and is taken by the administrator of the estate of Henry Dobbel, deceased, and by a creditor of his estate. The facts of the case may be briefly stated as follows: Henry Dobbel took out a paid-up policy of insurance upon his life in favor of his wife Margaretha. Margaretha died intestate; six years later her husband, Henry, died. The policy was made payable to "Margaretha L. Dobbel, her executors, administrators, or assigns." Upon the death of Henry, his son was appointed administrator of Margaretha's estate, and the insurance company paid him as such administrator the amount of the policy. The husband and wife left surviving them seven children, and, by the decree of distribution appealed from in this case, the trial court awarded the proceeds of this policy to the children in equal shares. It is now claimed by appellant that the estate of Henry Dobbel is entitled to all of said moneys as community property; and, secondly, if this contention be unsound, that his estate is entitled to one-third of said moneys, the husband being an heir of the wife, and the money being her separate property.

It cannot technically be said that the money here in dispute was either the separate property of the wife, or common property of the spouses, for this money was ⁴³⁵ the property of the insurance company until after the death of both, and until it passed to her administrator. But the insurance policy when issued was property, and valuable property. It could be sold, assigned, or bequeathed by the owner thereof. Its pecuniary value to its owners was as great as though they held a promissory note of the company for that amount, payable upon the same conditions. It was a chose in action, and upon its satisfaction by a payment of the amount speci-

fied the title to the money so paid followed the title to the policy.

This policy was the separate property of the wife under any aspect of the case. If it was bought with the separate property of the husband, or with money of the community, it was a gift by the husband to the wife. That a policy payable as the present one is payable is the separate property of the wife there is no question, viewed in the light of the authorities: *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196; 44 Am. Rep. 285, and cases there cited; Bliss on Life Insurance, sec. 317.

The principle involved and decided in the case cited from 86 Indiana is in all material respects the same as that which is now before us, and the court there used the following language: "The policy in this case, by its terms, was executed for the benefit of the wife, and by a fair construction was payable to her and not to the personal representatives of the husband. Upon its execution the title vested in the wife and not in the husband. By the procurement of the husband the wife became the owner of the policy, and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued, and paid the premiums, no one could doubt as to the ownership of the policy and the right to collect the money due thereon. We are unable to see in this case why there should be any difference in the ownership and title of the policy by reason of the application having been made and the premiums paid by the husband. Had the policy been made payable ⁴³⁶ to the husband, he doubtless might have given it to the wife, and by proper indorsements thereon conveyed to her the legal title to the same. In such case it would have become her separate property by gift from her husband; and so, too, he had the legal right in the first instance to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the property as her separate property."

The policy of insurance, being her separate property, passed to her heirs at the time of her death, she having died intestate, and her husband took a one-third interest therein by virtue of his heirship. There is no reason why the administration upon Margaretha's estate should have been delayed

until her husband's death. Conceding her estate to have consisted alone of the insurance policy, still it was property subject to administration and distribution as any other piece of personal property. If such administration and distribution had taken place prior to the husband's death he would have stood in the same relation to this policy as to any other separate property owned by her, and title to a one-third interest therein would have passed to him as an heir and distributee. If such a course had been followed his interest in the policy would have passed to his estate like any other property which may have belonged to him at the time of his death, and the mere fact that no administration was had upon his wife's estate until after his death in no way affects the title to the policy. The husband's estate occupies exactly the same position with reference to this policy that it does with reference to any other piece of property belonging to the wife at the time of her death. As an heir of his wife he had an interest in her estate which he could at any time have sold, subject to the claims of administration thereon. He could have disposed of it by will, and, if he had the right to sell or devise, and failed to exercise that right, it passed to his heirs, subject to administration.

437 For the foregoing reasons we think one-third of the moneys forming the proceeds of this insurance policy should have been distributed to the administrator of the estate of Henry Dobbel.

It is ordered that the judgment and order be reversed, and the cause remanded, with directions to the trial court to enter a decree in accordance with these views.

HARRISON, J., and VAN FLEET, J., concurred.

Hearing in Bank denied.

AN INSURANCE POLICY, ISSUED UPON THE LIFE OF A HUSBAND FOR THE BENEFIT OF HIS WIFE, is her property, and she alone can assign it, even during the lifetime of the husband: See monographic note to *Hooker v. Sugg*, 11 Am. St. Rep. 723, discussing the results of the death of a beneficiary before the death of a person whose life is insured. If the wife dies before the husband he cannot simply by his will, executed after the wife's death, dispose of the insurance money, of such a policy, so as to divert it from the heirs of his wife, the beneficiary: See note to *Newman v. Covenant Mutual Ins. Assn.*, 14 Am. St. Rep. 204.

NEITHER HUSBAND NOR WIFE IS HEIR TO THE OTHER.—The interest which one has in the estate of the deceased spouse exists by virtue of the

marital relation rather than as heir to the decedent: See monographic note to *In re Ingram*, 12 Am. St. Rep. 83, discussing succession to estates of intestates.

AN HEIR MAY ASSIGN HIS EXPECTED SHARE in his ancestor's estate: See *In re Estate of Garcelon*, 104 Cal. 570; post, p. 134.

EX PARTE COHEN.

[104 CALIFORNIA, 524.]

CONSTITUTIONAL LAW—CRIMINATING EVIDENCE—WITNESSES.—The constitutional provision that "no person shall be compelled, in a criminal case, to be a witness against himself," confers immunity from testifying only where his evidence would tend to subject him to prosecution and punishment for a criminal offense. Under all other circumstances he cannot avoid an answer on the ground that it may tend to criminate him. Hence, he may be compelled to answer, if the act charged does not constitute an offense, or is no longer punishable, or if the statute creating it has been repealed, or if the statute of limitations applies, or if he has been tried and acquitted, or if he is shielded by the statute.

CONSTITUTIONAL LAW—IMMUNITY OF WITNESS—CRIMINATING EVIDENCE.—THE PURITY OF ELECTION LAW exempts a person giving evidence against other persons under that law from indictment, information, prosecution, or punishment for the offense as to which his testimony is given. He is, therefore, not protected as a witness from answering upon the ground that this evidence may tend to criminate himself. This immunity includes not only the offense with which the defendant then under examination is charged, and in which the witness was a participant with such defendant, but also any other offense with which the witness may be charged, and to which such testimony may have reference, or which it may tend to establish.

STATUTES—PERSONAL PRIVILEGE—CONSTRUCTION.—A statute is to be construed with reference to its manifest object, and so as to give effect to such object consistently with the constitution. A statute involving a personal privilege or right conferred upon an individual by the constitution is to be liberally construed in favor of the individual.

ELECTIONS—STATUTORY CONSTRUCTION.—The proper construction of section 32 of the Purity of Election Law is that it was intended to secure evidence for the conviction of offenders against the provisions of the other sections of the statute, enumerated therein, requiring the co-operation of two or more persons, but that it is only upon a trial, hearing, prosecution, lawful investigation, or judicial proceeding against another person for offending against those provisions that a witness who has himself offended against them can be compelled to testify.

CONTEMPT—REFUSAL TO ANSWER QUESTIONS—HABEAS CORPUS.—A witness who refuses to answer questions propounded to him concerning violations of the Purity of Election Law by other persons with whom he has co-operated may be lawfully committed for contempt until he shall answer, and is not entitled to discharge upon *habeas corpus*, if so committed.

HEARING in the supreme court upon a writ of *habeas corpus*.

Carroll Cook and H. I. Kowalsky, for the petitioner.

J. N. Nougues, *contra*.

525 HARRISON, J. While Louis Steinberger was under examination before the Hon. W. T. Wallace, one of the judges of the superior court of San Francisco, sitting as a committing magistrate, in which said Steinberger was charged with a felony in "having willfully caused, procured, and allowed one Louis Cohen to be registered 526 upon the precinct register of the first precinct of the forty-third assembly district of the state of California in the city and county of San Francisco, state of California, knowing said Louis Cohen not to be entitled to such registration," the petitioner was called as a witness on the part of the people, and, having been sworn as such witness, was asked the following questions, viz:

"Q. Mr. Cohen, where do you reside?

"Q. On the third day of October, 1894, where did you reside?

"Q. Do you know the defendant, Louis Steinberger?

"Q. Did you have any conversation with Mr. Steinberger on the third day of last October respecting your going and procuring yourself to be placed upon the great register of this county?

"Q. Or the precinct register of this city and county?

"Q. Did you register or procure your name to be placed upon the precinct register of the first precinct of the forty-third assembly district on the 3d of last October?

"Q. Were you present at the Baldwin Hotel with Mr. Steinberger on the third day of October?

"Q. At Mr. Steinberger's direction did the clerk of the Baldwin Hotel furnish you with a key to a certain room in the hotel?"

The witness refused to answer each of these questions as they were propounded to him, on the ground that his answer might incriminate him, whereupon the judge stated to him: "It is a legal impossibility in this case to expose yourself by your testimony here. I instruct you that you are bound to answer. You must answer." But, notwithstanding such direction, the witness still refused to answer, and was thereupon adjudged guilty of contempt, and ordered to be im-

prisoned in the common jail of the city and county of San Francisco, until he answer said questions and each of them before said judge.

The right of the legislature to determine who shall be competent witnesses to establish any fact under judicial ⁵²⁷ examination, and to compel the attendance of such witnesses, cannot be disputed. Every person is subject to the power of the legislature to compel him in any judicial proceeding to give testimony of any fact within his knowledge and material to the issue, except in so far as the constitution restrains the legislature from exercising this power, or protects the individual from a compulsory compliance with its attempted exercise. The constitution of this state has limited the extent to which the legislature may exercise this power, and has given to the individual a protection against its exercise by providing in article I, section 13, that "no person shall be compelled in any criminal case to be a witness against himself." It is needless to review the history and development of this provision. It is an outgrowth of the common law of England, and almost at the commencement of our present government was incorporated into the national constitution, and is found in the constitution of every state in the country. The object of the provision is the immunity of the individual from compulsory self-accusation. This immunity is, however, to be limited to the purpose for which it is given, viz., the protection of the witness from being compelled to furnish any evidence from which he may be subjected to prosecution or punishment, and is not to be extended so as to include an exemption from being compelled to give evidence that could not under any circumstances tend to his conviction of an offense against the laws of the state.

The provision that a person shall not be compelled "in a criminal case" to be a witness "against himself" is to be construed as protecting him from being compelled to give any evidence which in a criminal prosecution against himself might in any degree tend to establish the offense with which he may be charged. It is only when his evidence may tend to establish an offense for which he may be punished under the laws of the state that he is a witness "against himself" in a criminal case. The "criminal case" in which he is a ⁵²⁸ witness need not be against himself, but his immunity from compulsion extends to all evidence which may be used in any criminal case against himself, under whatever

circumstances such evidence may be sought; but the fact that in a proceeding in which he is not the defendant his testimony may tend to show that he has violated the laws of the state, is not sufficient to entitle him to claim this protection of the constitution, unless he is at the same time liable to prosecution and punishment for such violation. If, at the time of the transactions respecting which his testimony is sought, the acts themselves did not constitute an offense, or, if, at the time of giving the testimony, the acts are no longer punishable; if the statute creating the offense has been repealed; if the witness has been tried for the offense and acquitted, or, if convicted, has satisfied the sentence of the law; if the offense is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim any privilege under this provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and, consequently, he is not compelled to be a witness "against himself." Equally is he deprived of claiming this exemption from giving evidence if the legislature has declared that he shall not be prosecuted or punished for any offense of which he gives evidence. Any evidence that he may give under such a statutory direction will not be "against himself," for the reason that by the very act of giving the evidence he becomes exempted from any prosecution or punishment for the offense respecting which his evidence is given. In such a case he is not compelled to give evidence which may be used against himself in any criminal case, for the reason that the legislature has declared that there can be no criminal case against him which the evidence which he gives may tend to establish.

Section 32 of the Purity of Election Law (Stats. 1893, p. 26), under which the examination of Steinberger was had, provides: "A person offending against any provision ⁵²⁹ of sections [enumerating certain sections of the act] is a competent witness against another person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding, or lawful investigation or judicial proceeding, in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offense with reference to which his testimony

was given, and may plead or prove the giving of testimony accordingly in bar of such indictment, information, or prosecution." This section is taken from the statute of New York, known as the Corrupt Practices Prevention Act, and is also found in the English statute upon the same subject; and the closing paragraph of the section is also found in the statutes of New York, passed in 1869, for the punishment of bribery, and subsequently incorporated in section 79 of the Penal Code of that state. Statutes containing similar provisions have been passed in many of the states of this country for the purpose of securing conviction for offenses in which two or more persons are required to participate in order to constitute the offense, such as bribery, gambling, dueling, usury, selling intoxicating liquors, and others; the legislatures doubtless considering that the offense would be effectually suppressed if one of the offenders only could be punished, and for that purpose making his participant in the offense a competent witness by exempting him from punishment. In the greater number of these statutes the provision of exemption was that the testimony should not be used against the witness; and prior to the decision in *Counselman v. Hitchcock*, 142 U. S. 547, in 1891, the decisions under these statutes were nearly uniform that this was a sufficient immunity; but under the rule laid down in that case such a provision does not meet the requirements of the constitution, and unless there be an absolute ⁵³⁰ immunity from all punishment for any offense respecting which the witness may be called upon to testify, he may claim the protection of the constitution against being compelled to give evidence against himself. Rulings similar to that in *Counselman v. Hitchcock*, 142 U. S. 547, had been previously made in *Emery's case*, 107 Mass. 172, 9 Am. Rep. 22, and in *Cullen v. Commonwealth*, 24 Gratt. 624. The same principle was established in this state in *Ex parte Clarke*, 103 Cal. 352. In *State v. Nowell*, 58 N. H. 314, it was held under the provisions of a statute that the evidence given by a witness should not be used against him, and that he should not be thereafter prosecuted for any offense so disclosed by him; that this exemption gave him all the protection which was guaranteed by the constitution, upon the ground that his legal immunity from prosecution was equivalent to his legal innocence of the crime disclosed by his testimony.

A statute is to be construed with reference to its manifest object, except as such object may be defeated by the language

of the statute itself. The language used is not to be enlarged beyond its ordinary construction for the purpose of effecting such object, nor, on the other hand, is it to receive such a technical or limited construction as will defeat the manifest purpose of the statute. If the language is susceptible of two constructions, one of which will carry out and the other will defeat such manifest object, it should receive the former construction. So, too, if a statute is susceptible of two constructions, one of which is consistent with the constitution, and the other repugnant thereto, it should be so construed as to be effective rather than void. Any statute involving a personal privilege or right conferred upon an individual by the constitution is to be liberally construed in favor of the individual. The manifest object of section 32 aforesaid is to secure evidence for the conviction of offenders against the provisions of the other sections of the statute which are enumerated therein; but it is only upon a "trial, hearing, ⁵³¹ prosecution, lawful investigation, or judicial proceeding" against another person for offending against the provisions of those enumerated sections, that a witness, who has himself offended against these provisions of the sections, can be compelled to testify. The offenses referred to in the enumerated sections are those against the purity of election which require the co-operation of two or more persons, and the provision that one of these parties offending may be compelled to give testimony would be nugatory, in view of his constitutional protection, unless the legislature had at the same time furnished him with a shield for any offense with reference to which he would be compelled to testify.

By the provisions of this section the petitioner has the full protection guaranteed to him by the constitution against any self-accusation of crime. In addition to providing that his testimony shall not be used against him, it is declared that he shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment "for the offense with reference to which his testimony was given," and that he may plead or prove the giving of testimony in bar of such indictment, information, or prosecution. The immunity thus given includes, not only the offense with which the defendant then under examination is charged, and in which the witness was a participant with such defendant, but also any other offense with which the witness may be charged, and to which such testimony may have

reference or which it may tend to establish. "The offense with reference to which his testimony was given" is broader in its terms and has a wider scope than "the offense with which the defendant is charged," and the exemption from prosecution or punishment consequent upon his giving testimony in reference thereto, when considered in view of the personal privilege given by the constitution, must receive a liberal construction in its favor. The statute purports to compel him to testify "in the same manner as any other person," and, as the equivalent for his constitutional ⁵³² protection, gives him a legislative protection of equal scope and effect by exempting him from all liability to punishment for the offense with reference to which he testifies. The exemption is as broad as the compulsion, and the protection is equal to that given by the constitution. The testimony which he may be compelled to give is the same as that which could be required of any other witness, and includes any matter within his knowledge which is relevant to the offense under investigation and material to its determination. If, in giving such testimony, the testimony has reference to another offense committed by himself, he is within the protection of the statute, and, upon any prosecution for such offense, is authorized to plead or prove in bar thereof that under the compulsion of this section he gave testimony with reference to such offense.

We hold, therefore, that the petitioner should have answered the questions propounded to him, and that he was rightly adjudged guilty of contempt in refusing to answer them.

The writ is discharged and the petitioner remanded.

GAROUTTE, J., and McFARLAND, J., concurred.

WITNESS—SELF-CRIMINATION.—A witness cannot refuse, on the ground of self-crimination, to answer a question relating to an offense already barred by the statute of limitations: *Calhoun v. Thompson*, 56 Ala. 166; 28 Am. Rep. 754.

WITNESS—SELF-CRIMINATION.—After a statute has declared that evidence given by a witness shall not be used against him he may be compelled to give answers which otherwise would criminate him: *Ex parte Buskett*, 106 Mo. 602; 27 Am. St. Rep. 378.

STATUTES, HOW CONSTRUED—ELECTIONS.—The object and intent of statutes must be considered in construing them: *Parvin v. Wimberg*, 130 Ind. 561; 30 Am. St. Rep. 254.

IN RE ESTATE OF GARCELON.

[104 CALIFORNIA, 570.]

CONTEST OF WILL—PROOF OF MATTER IN CONFESSION AND AVOIDANCE OF COMPROMISE AGREEMENT WITH DECEDENT—PLEADING.—Though a compromise agreement between a decedent and the petitioner in a will contest is set up by the answer in bar of the petition, and admitted for want of a denial, yet the petitioner may prove matter in confession and avoidance thereof, without pleading the same, by way of reply, if he brings it to the attention of the court. After defendant's motion for a dismissal of the petition, by reason of such admission, and which was opposed only on the grounds that the agreement did not estop the petitioner, that there had been no trial of the issues, and that there had been denied a trial of such issues by jury, the petitioner cannot urge for the first time, on appeal, that he was entitled to make proof of other facts showing his right to contest the will.

CONTEST OF WILL—HEIR'S AGREEMENT TO RELINQUISH HIS RIGHTS AND NOT TO CONTEST IS A VALID CONTRACT—ESTOPPEL.—A compromise agreement between an heir at law and his ancestor, whereby the former agrees, in consideration of certain property delivered to him, to release and relinquish his expected share in the ancestor's estate, and not to contest the provisions of his ancestor's will, is, when entered into with deliberation by competent parties, a valid and binding contract, and will estop the heir from maintaining any proceeding to revoke the probate of such will.

TRANSFER OF HEIR'S EXPECTANCY—RULE AT COMMON LAW AND IN EQUITY—STATUTORY CONSTRUCTION.—At common law a mere possibility, such as the expectancy of an heir, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule is different, and agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, are enforced upon the death of the ancestor. Sections 700 and 1045 of the Civil Code were intended to state the rule of the common law, but not to make any change in the equitable rule.

STATUTORY CONSTRUCTION—COMMON LAW.—Provisions of the code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments.

STATUTORY CONSTRUCTION.—THE PRESUMPTION IS, that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law, unless such intention is made to clearly appear either by express declaration or by necessary implication.

AN HEIR MAY RELEASE TO THE ANCESTOR HIS EXPECTED SHARE in the ancestor's estate, and thereby estop himself from claiming as heir any portion of such estate as might otherwise in the future vest in him as such heir.

VALIDITY AND CONSTRUCTION OF AGREEMENT NOT TO CONTEST A WILL.—The agreement of an heir not only to relinquish all expectancy to his ancestor's estate, but never in any manner, or any extent, to question, dispute, or contest any disposition by the ancestor, of the property mentioned in the agreement, whether made by deed or by last will and testament, is valid, and estops the heir from contesting any will purporting to

be executed by the ancestor. It cannot be limited to such a will as the heir may deem valid, or which may be adjudged valid, after a contest.

RIGHT OF EXECUTORS TO INVOKE COVENANT NOT TO CONTEST WILL—PRIVITY.—The executors of the will of a deceased ancestor are in such privity with him that they have the right, as against an heir at law, who petitions to revoke the probate of the will, to invoke the benefit of the heir's covenant in a compromise agreement not to contest the will.

RELEASE.—AT COMMON LAW A MERE POSSIBILITY was not the subject of release, and a release at common law was held to operate only upon a present interest.

CONTEST OF WILL—RELEASE OF FUTURE POSSIBILITY—COVENANT NOT TO CONTEST, AND ITS ENFORCEMENT IN EQUITY.—If the subject matter of an existing covenant not to contest a will is in the mind of the contracting parties, and the covenant operates as a release of an expectancy as heir, a court of equity, upon the same principle that it upholds assignments of such expectancies, will sustain such covenant as a release by the presumptive heir of his contingent right to contest the will of his ancestor, and enforce the same, when fairly obtained, and for an adequate consideration.

CONTEST OF WILL—CONTRACT NOT TO CONTEST, HOW AFFECTED BY PUBLIC POLICY—ENFORCEMENT OF CONTRACTS.—An heir's covenant not to contest the will of his ancestor is not void as against public policy, or the policy of the law that an invalid will shall not be established as a valid will; but is in harmony with the paramount public policy that parties of full age and competent understanding shall have liberty to contract, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice.

▲ **CONTRACT NOT TO CONTEST A WILL IS ONE THAT CONCERNS PRIVATE PARTIES ALONE.**—It is not against public policy, and is as much entitled to be enforced as a valid compromise of the contest of a will, which, when fairly made, is always enforced.

APPEAL from an order dismissing a petition for the revocation of the probate of a will. The appellant was a nephew of Catherine M. Garcelon, deceased, whose will had been admitted to probate. Appellant, in his petition for the revocation of the probate of the will, alleged that the testatrix was of unsound mind when she made her will, and therefore that it was not her will; that its execution was procured by undue influence, for the purpose of preventing the petitioner, as heir and next of kin, from coming into any portion of her estate by succession, or under her will; that she had obtained all of her property from the estate of her brother, Dr. Samuel Merritt; and that the petitioner and his brother were the nephews and the only next of kin of the testatrix. The answer denied that the said Catherine M. Garcelon was of unsound mind, or incompetent to make a will, or that the will probated as her last will and testament was executed under undue influence. In addition to these denials there

was a separate defense, showing that the two brothers being dissatisfied with the terms of Dr. Merritt's will had threatened to contest the probate thereof, but that a compromise was effected, whereby the said Catherine M. Garcelon and her two nephews entered into a written contract, by the terms of which the former was to pay to her said two nephews the sum of one hundred and twenty-five thousand dollars, and also to convey certain real property to a trustee upon a certain condition subsequent, the trustee to collect and pay over the income to the nephews, and in consideration of which the latter were to release to their said aunt their claims as heirs of her brother, Samuel Merritt, and for that purpose were to execute to her a proper deed of conveyance of their interest in said estate. Deeds were executed by the brothers for the purpose of carrying out the compromise agreement, and in which each of the two nephews stipulated that he would never make any claim to any portion of the property derived by the said Catherine M. Garcelon under the will of Dr. Samuel Merritt, except such as he might be able to assert as a devisee or legatee under her last will and testament. The answer alleged that the said Catherine M. Garcelon had fully complied with all the terms of the compromise on her part, and that she had acquired all of her estate from the estate of Dr. Samuel Merritt, and under the terms of his will. The genuineness and due execution of the compromise agreement were not denied by the petitioner. His written request for a jury trial as to the "issues" of competency and undue influence was denied, and the cause was tried by the court. The defendants moved to dismiss the petition upon the ground that the petitioner was estopped by said contracts and deeds from questioning the validity of the will, and upon the further ground that it appeared that he had no interest in the estate of said decedent. This motion was opposed by the petitioner upon certain specific grounds stated in the opinion. The court ordered the petition dismissed upon the grounds stated in the motion of defendants.

Horace W. Philbrook, Alfred H. Cohen, J. C. Martin, Van R. Paterson, and A. A. Moore, for the appellant.

E. Nusbaumer, Warren Olney, H. C. Campbell, and John Garber, for the respondents.

⁵⁸¹ DE HAVEN, J. 1. Notwithstanding the genuineness and due execution of the compromise agreement, as contained in

the several instruments set out in the answers, were admitted by the failure of petitioner to file an affidavit denying the same (Code Civ. Proc., sec. 448), he still insists that the court erred in dismissing the petition without giving him an opportunity to show that such agreement was, in fact, without consideration, or that his consent thereto was obtained by fraud, or that it had been extinguished by rescission, or that performance thereof had been waived by the deceased. It is true that, by the terms of section 462 of the Code of Civil Procedure, new matter in an answer is deemed to be controverted without any special replication, and under that section a plaintiff has the right, while not denying the genuineness and due execution of an instrument set out in an answer, to show other matters in confession or avoidance thereof. But unless he brings to the attention of the trial court his purpose to offer such evidence, that court cannot assume that he desires ⁵⁸² to make any such defense, and in this case the motion of defendants for a dismissal of the petition was not opposed upon the ground that the petitioner desired to offer any proof tending to show that the contracts and deeds set out in the answers were not freely entered into by the parties thereto, and for an adequate consideration, or that the same were superseded by any subsequent agreement, or that Mrs. Catherine M. Garcelon had ever waived performance of the agreements therein contained. On the contrary, the motion was opposed upon the grounds: 1. That the instruments set out in the answer contained no matter sufficient to estop the petitioner from maintaining this proceeding, or from showing that he has an interest in the estate of Catherine M. Garcelon; and 2. That no trial of the issues of fact tendered by the petition had been had, and that petitioner had been denied a trial of such issues by a jury. The court below, therefore, properly assumed that these were the only grounds upon which the petitioner opposed the motion, and it is too late to suggest here for the first time that he was entitled to make proof of other facts showing his right to contest the will of deceased, and which would have been sufficient to avoid the estoppel which, the trial court held, resulted from the compromise agreement.

2. The main question arising upon this appeal relates to the construction and effect of the compromise agreement set out in the answers. That agreement seems to have been prepared with great care, and there is no ambiguity in any

of its provisions. By its terms the appellant and his brother waived their right, as heirs of Dr. Merritt, to contest the will left by him, or to claim any portion of the estate bequeathed and devised by him to their aunt, other than the portion thereof which she gave and relinquished to them by that agreement; and in consideration of the property thus secured to them they further agreed "that they, nor either of them, nor their respective heirs, shall or will at any time hereafter assert any right, title, or interest as heirs or ~~583~~ heirs at law of the said Catherine M. Garcelon to the property, real and personal, derived by her under the said last will and testament of the said Samuel Merritt"; and doubtless, for the purpose of making the foregoing agreement upon their part more effectual, the appellant and his brother, in the deed executed by them for the purpose of carrying out the compromise agreement, and which is to be construed as a part of such agreement, covenanted "to and with the said Catherine M. Garcelon, her heirs, devisees, legatees, executors, administrators, and assigns," that they would not "in any manner, or to any extent, question, dispute, or contest any disposition of the property above mentioned or referred to, or any part thereof, or of any property which may be acquired therefrom or thereby which the said Catherine M. Garcelon may have made, or may hereafter make, by either deed, or by her last will and testament."

There is not the slightest contention that the parties to this agreement were not fully competent to contract in relation to their property rights, and the agreement itself recites that it was entered into "after full examination into the facts, and full and deliberate consideration of the premises"; and there is nothing upon its face to suggest that the differences thereby compromised were not settled upon fair and equitable terms, nor was there any offer to prove extrinsic facts for the purpose of impeaching the agreement in this or any other respect. The questions for decision, therefore, are whether such an agreement, based upon a full and adequate consideration, and entered into with deliberation by parties in every way competent to contract, is valid, and, if valid, is the petitioner thereby estopped from maintaining this proceeding to revoke the probate of the alleged will of his aunt. The agreement, as we have seen, in addition to his promise not to contest the will of his uncle, Dr. Merritt, contains two distinct covenants upon the part of the petitioner: 1. That

he would not thereafter, as an heir at law of his aunt, Mrs. Garcelon, assert any right ⁵⁸⁴ to the property derived by her under the will of his said uncle; and 2. That he would never in any manner question or dispute any disposition which she might make of that property by deed or will. The first of these covenants is, in substance and effect, an agreement upon the part of the petitioner to relinquish as heir presumptive his expectancy in that portion of the estate of his aunt to which the agreement related. It is claimed by the petitioner that such an agreement is void under sections 700 and 1045 of the Civil Code of this state, the first of which provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind," and the latter section declaring that "a mere possibility, not coupled with an interest, cannot be transferred."

These sections simply state the well-settled and well-understood rule of the common law upon the subject to which they relate. At common law a mere possibility, such as the expectancy of an heir, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule was different, and agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, were enforced upon the death of the ancestor; and, in our opinion, it was not the intention of the legislature, in enacting the sections of the code just referred to, to make any change in the rule by which courts of equity were theretofore governed in dealing with this class of contracts. This construction of these sections is in harmony with section 5 of the same code, which declares that the provisions of that code, "so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments"; and also follows the presumption that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law unless such intention is made to clearly appear either by express declaration or by necessary implication.

⁵⁸⁵ Mr. Story, in section 1040 c, volume 2, of his work on Equity Jurisprudence, states the equitable rule upon the subject of such agreements as the one before us as follows: "So, even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement; and, in such a case, if made *bona fide* for a

valuable consideration, it will be enforced in equity after the death of the ancestor; not, indeed, as a trust attaching to the estate, but as a right of contract": And see, also, as sustaining the same proposition, Pomeroy's Equity Jurisprudence, 2d ed., secs. 168, 953; *Bacon v. Bonham*, 33 N. J. Eq. 614.

In accordance with this principle it has been held in many cases in which the question has arisen that an heir may release to the ancestor his expected share in the ancestor's estate. Thus, in *Havens v. Thompson*, 26 N. J. Eq. 383, it was held that a son, by such release to his father, estopped himself from claiming as heir any portion of the father's estate. In that case it appeared that the father gave to the son the sum of six hundred dollars, upon the condition that it should be accepted in full satisfaction of his interest in the father's estate, the son executing a receipt stating that the money was received "in full in lieu of dowry." The chancellor construed the receipt in view of the facts surrounding its execution as a release, and said: "I regard this instrument as an agreement by which Benjamin, in consideration of the money paid to him by his father, agreed with the latter that he would make no claim to a share of his father's estate should the latter die intestate, but therefrom would be debarred by that instrument made upon what was a satisfactory compensating consideration. Such an agreement may be made between a father and his child in regard to the interest of the latter in the estate of the former, and effect will be given to it in equity according to the intention of the parties"; and the rule thus declared was afterward approved in *Brands v. De Witt*, 44 N. J. Eq. 545; 6 Am. St. Rep. 909.

In *Bishop v. Davenport*, 58 Ill. 105, it was shown that ~~586~~ the father in his lifetime gave to certain of his children property, and took from them an instrument in writing in which they acknowledged that such property was received by them as their full share of his estate. The father died intestate, and the court, in passing upon the question, held that the transaction was not an advancement, and that the instrument signed by the children operated as a release by them of their expectancies in their father's estate, and should be upheld as such.

So, also, in *Kershaw v. Kershaw*, 102 Ill. 307, a son accepted from his father a deed, the deed reciting that "said land is deeded as an advancement to said John W. Kershaw out of the estate of said Joseph Kershaw, and the deed is accepted

by said John as his full share of his father's estate." The court in that case held that the acceptance of the deed bound the son to the same extent as if he had signed it, and that the conveyance did not constitute an advancement, but operated as "an executed contract, whereby an heir released his expectancy in his father's estate in consideration of a present grant of real estate." And it was further there decided that the son was estopped from making any further claim as heir at law to any portion of his father's estate.

In *Crum v. Sawyer*, 132 Ill. 443, the court, in a well-considered opinion, held that a husband might, for an adequate consideration, enter into a valid contract with his wife, releasing all his interest as her heir in her lands and personal estate, saying: "There can be no question, then, that the complainant's contingent interest or expectancy as the heir of his wife in her real and personal estate was a proper subject of contract, and the contract in question having been made upon a valuable consideration by parties capable of contracting with each other, and, so far as the evidence shows, with entire fairness, it should, as to such contingent interest or expectancy, be enforced according to its terms." And in *Power's Estate*, 63 Pa. St. 443, it was decided that a father might make a contract with his child which would bar the latter as his heir at law, and that when ⁵⁸⁷ property had been received by the son from the father, the son giving a receipt reciting that the same was received in full of his share as heir at law, he was thereby estopped upon the death of the father from claiming any further part of his estate.

Without multiplying authorities upon this point, and many others might be cited to the same effect, it is sufficient to say that we are entirely satisfied with the rule declared in the foregoing cases, and hold that it is competent for an heir under the limitations stated in that rule to relinquish to his ancestor all interest in the estate of the latter which might otherwise, in the future, vest in him as such heir.

In *Crum v. Sawyer*, 132 Ill. 462, it was held that such a relinquishment would inure to the benefit of the other heirs, whether mentioned or not, and in all the cases we have cited the release so made to the ancestor was enforced in behalf of other heirs. In this case, however, it is claimed by the petitioner that the pleadings admit that he and his brother are the only heirs of Mrs. Garcelon, and it is thence argued: 1. That if, in fact, she died intestate her property must,

under the statutes of this state, be distributed to them, notwithstanding they may by the compromise agreement have relinquished to her their rights as such heirs; and 2. That the defendants are strangers in no way in privity with that agreement, and, therefore, are not entitled to claim the benefits of its provisions.

In the view we take of this case it is not necessary to determine what force, if any, there might be in the first of these contentions, if Mrs. Garcelon had in fact died intestate, and the question arose upon the distribution of her estate as that of an intestate. It is admitted that Mrs. Garcelon executed, apparently in due form of law, a document which, upon its face, purports to be her will, and which, if valid, disposed of all her estate consisting of all the property referred to in the compromise agreement of which she died possessed, and this document has been duly admitted to probate as her last will and testament. ⁵⁸⁸ So long as this judgment stands it cannot be said that the deceased died intestate, and, unless the petitioner shall succeed in annulling the said judgment of probate, the question as to what would have been his rights as her heir at law if she had died intestate can never arise. The real question is, Does the petitioner have the right to maintain this proceeding in the face of his agreement that he would not contest any will of his aunt? The court below held that he could not, and this was one of the grounds upon which the court based its judgment dismissing the present proceeding.

3. This conclusion of the learned judge of that court was doubtless based upon a consideration of that part of the compromise agreement in which the petitioner covenanted with Mrs. Garcelon, "her heirs, devisees, legatees, executors, and administrators," that he would "never in any manner or to any extent question, dispute, or contest any disposition of the property" mentioned in that agreement "which she may have made, or may hereafter make, by either deed or by her last will and testament." If this covenant is valid, and is sufficiently broad to apply to and include a will, the validity of which is challenged, as is this, upon the grounds of incompetency of the maker, or because of its alleged execution under duress, or undue influence, it is clear that the defendants, as executors of the disputed will, are in such privity with the alleged testator that they have the right, as against the petitioner, to invoke the benefit of this covenant not to

contest (*Dakin v. Dakin*, 97 Mich. 289), and it would follow that the court below was correct in its ruling upon this point.

This particular covenant was evidently inserted by the parties for the purpose of supplementing the other part of the compromise agreement in which the petitioner relinquished to his aunt his expectancy as her presumptive heir at law, and was intended by him as a complete relinquishment or release of all right to contest, upon such grounds as are set forth in the petition filed in this proceeding, any will apparently executed in due form ⁵⁸⁹ and, in fact, signed by his aunt, and which right of contest might otherwise, as a matter of possibility, come to him in the future as such heir at law. To place any other construction upon the agreement would deprive it of all practical meaning and effect. The agreement not to contest was made in view of the fact that, under the law, an heir is given the right to contest the validity of the document actually intended by the ancestor as his last will and testament, some of the grounds upon which such a contest is permitted by the statute often involving doubtful questions of law and fact; the latter, perhaps, depending for their decision upon the conflicting evidence of witnesses, and also upon the verdict of a jury which may be more or less influenced by sympathy or caprice; and the covenant of the petitioner was that he would not bring such questions concerning any will made by his aunt into dispute or litigation. Such being its true construction, we are brought to the consideration of the question, Is such an agreement upon the part of an heir binding upon him? The covenant not to sue for a breach, or for the enforcement of an existing obligation, operates as a release of such obligation; and unless void as against public policy (a point to be hereafter noticed), this covenant not to contest the will of Mrs. Garcelon should be given effect as a release by the petitioner of his right to make such contest. It is true that at common law a mere possibility was not the subject of release, and that a release was held to operate only upon a present interest: *Pierce v. Parker*, 4 Met. 80; *Reed v. Tarbell*, 4 Met. 93. A covenant made by one person not to sue another for or in respect to any matter arising out of future contracts between them, or by reason of any future tort, would, of course, be utterly void, as the parties to such contract could not have in view any particular subject matter, or have any conception of the amount which might be involved in the causes of action upon which the

covenant was to operate. But in this case the subject matter of the covenant was in the mind of the contracting ⁵⁹⁰ parties, and was in its nature no more fleeting and unsubstantial than the assignment of an expectancy, and the same principle upon which courts of equity uphold such assignments will sustain the proposition that a release by a presumptive heir of his contingent right to contest the will of his ancestor may also be enforced when fairly obtained, and based upon an adequate consideration. The two contracts stand upon the same basis; both relate to possibilities, and both concern the same subject matter—the expectancy of the heir—the purpose of the latter agreement being to take away from the heir any right to assert any claim to such expectancy, in the face of a will bequeathing or devising it to another, and both are equally entitled to enforcement.

4. It is argued, however, in behalf of petitioner, that such an agreement is void because against public policy, and in support of this contention the case of *Home Ins. Co. v. Morse*, 20 Wall. 451, is cited. In that case it was held that an agreement by an insurance company in its contract of insurance not to litigate in the federal courts any claim arising upon the contract was void; and in *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, a similar question was decided in the same way, and the reasons for such a conclusion were very fully and carefully stated by Chief Justice Shaw in a clear and comprehensive opinion, but there is no analogy between those cases and the one before us, and the reasons upon which the decisions in those cases rest are not at all applicable to a covenant not to contest a will such as we are now considering.

5. The petitioner further contends that it is against the policy of the law that the will of an insane person, or a will executed under the influence of fraud or duress, should be established as a valid will, and that this particular covenant is void, because it attempts to bind the petitioner not to show such facts, and thereby attempts to prevent him from establishing the invalidity of the will in controversy.

In passing upon this question we start with the proposition ⁵⁹¹ laid down by Sir G. Jessell, M. R., in his opinion in the case of *Printing Numerical Registering Co. v. Sampson*, 19 L. R. Eq. Cas. 465: "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void, as being against public policy, because, if

there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contract, and that their contracts when entered into freely and voluntarily shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.”

The sole object which the parties had in mind in entering into the covenant now under consideration was to secure to Mrs. Garcelon the right to make such disposition of her property as she might desire, free from the contingency that her right so to do, or the fact that in so disposing of it she acted freely or voluntarily, might after her death be disputed by the petitioner or his brother; and, as before stated, the agreement was made in contemplation of the fact that controversies concerning the validity of wills or deeds frequently involve doubtful questions of fact, and that, by reason of false testimony or the weakness of juries, their final decision may not always be in accordance with the actual justice and truth of the case; and we see no reason why persons whose rights of property would be affected by the decision of such questions may not in advance, for an adequate consideration, waive their right to engage in such litigation. Such a contract is one that concerns the parties alone, and does not appear to us to be against public policy. There never has been any doubt that parties actually engaged in contesting a will upon any of the grounds upon which such contests are permitted may compromise all matters in difference arising out of such contest, and allow the disputed will to be established, and such agreements, when ⁵⁹² fairly made, are always enforced. It is difficult to understand why such a compromise agreement is any less against public policy than an agreement made by an heir apparent or heir presumptive with his ancestors not to contest a future will of the latter. In addition to this we think the principle upon which the case of *Cooke v. Turner*, 14 Sim. 493, was decided is sufficient to sustain the validity of this covenant, so far as relates to the question of public policy. The question in that case arose upon a condition in a will, to the effect that, if a devisee should dispute the will or the competency of the testator to make it, the devise thereby given to her should be revoked. It was argued in that case that such a condition was void, as

against public policy, because having a tendency to set up the wills of insane persons by restraining heirs named therein as devisees from contesting such wills; but the court, in answer to this argument, said: "There appears to be no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other doubtful question, whether of fact or of law, on which the title to a devise or grant may depend." And the court then, after calling attention to certain conditions, which, if found in a will, would be declared void as against public policy, such as conditions in restraint of marriage or of lawful trade, proceeded to say: "But, in the case of a condition such as that before us, the state has no interest whatever, apart from the interest of the parties themselves. There is no duty, either perfect or imperfect, on the part of an heir to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or by the devisee; and we conceive, therefore, that the law leaves parties to make just what contracts and engagements they may think expedient as to raising or not raising questions of law or of fact among themselves, the sole object of which is to give the enjoyment of the property to one claimant rather than to another." This reasoning is applicable to the case at bar, for it must be admitted that that which is valid by way of condition, ⁵⁹² whether in a will or deed, would also be valid as a covenant contained in a contract: See, also, as sustaining the decision in *Cooke v. Turner*, 14 Sim. 493, *Bradford v. Bradford*, 19 Ohio St. 546; 2 Am. Rep. 419; 2 Jarman on Wills, *902; 2 Redfield on Wills, 679.

We have given to the earnest and able argument of the attorneys for the petitioner careful consideration, and, while we have not noticed in detail all the points urged by them in support of this appeal, the views above set forth are really conclusive of every question discussed by them.

Our conclusion upon the whole case is that the compromise agreement is valid, and that the petitioner is thereby estopped from maintaining this proceeding; and it follows therefrom that the superior court did not err in refusing petitioner's demand for a trial of the issues relating to the sanity of the testator or her freedom from undue influence. If the petitioner was not entitled to litigate these matters the orderly course of procedure required that the court should dismiss his petition, as it did.

The respondents have moved to dismiss the appeal, but, in view of our conclusion upon the merits, it is not necessary to discuss the grounds of such motion. We think the motion should be denied.

Motion to dismiss appeal denied, and judgment affirmed.

FITZGERALD, J., and MCFARLAND, J., concurred.

Hearing in Bank denied. —

HEIR'S RELEASE OF EXPECTANCY—ESTOPPEL.—An heir at law may release to his father, for a sufficient consideration, all the share which he would otherwise acquire in the latter's estate on his death; and such release will estop such heir from claiming any interest in such estate as one of the heirs at law of his father: *Brands v. De Witt*, 44 N. J. Eq. 545; 6 Am. St. Rep. 909, and note. A contract, however, to convey an expected interest must be free from fraud and oppression, and be made with the ancestor's knowledge and consent of the ancestor, or it will be void as against public policy: *McClure v. Raben*, 133 Ind. 507; 36 Am. St. Rep. 558.

COMPROMISE—CONTESTING WILL.—An agreement by beneficiaries under a will with an heir at law, who is cut off by the will, and threatens to contest it on the ground of undue influence, to pay him money, in consideration of his desisting, is valid if the heir at law honestly thought he had reasonable ground for setting up that claim: *Bellows v. Sowles*, 55 Vt. 391; 45 Am. Rep. 621.

PEOPLE'S HOME SAVINGS BANK v. SUPERIOR COURT.

[104 CALIFORNIA, 649.]

CORPORATIONS—BY-LAWS—PROXIES.—If the statute allows stockholders of a corporation to be represented at all elections by proxies of their own selection, a by-law of a banking corporation, providing that no proxy shall be voted by any one not a stockholder of the corporation, is void, as being an infringement upon the statute.

CORPORATIONS—LIMITATION UPON BY-LAWS.—A by-law cannot take away, or even abridge, the substantial rights of a stockholder of a corporation.

CORPORATIONS—STATUTES—BY-LAWS AUTHORIZING A MODE OF VOTING BY PROXY.—A statute authorizing a corporation to provide in its by-laws for "the mode of voting by proxy" refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, and does not authorize the curtailing of the right to vote by proxy, but only to regulate the exercise of the right by requiring the authority to be in writing, properly witnessed, acknowledged, and filed with the records, etc.

RIGHT OF ATTORNEY TO SUBSTITUTION.—If the attorneys representing a banking corporation are dismissed upon a change of its officers, and a new attorney appointed, he is entitled to be substituted as attorney in a prohibition proceeding by the bank to prevent the appointment of a

receiver in a creditor's suit against it. The bank has a right to dismiss such proceeding, and the attorneys dismissed cannot object that the new attorney was retained for that purpose, or that he was also attorney for the receiver.

MOTION in the supreme court for the substitution of attorneys.

James Alva Watt and John H. Durst, for the motion.

Delmas & Shortridge, contra.

650 GAROUTTE, J. The present proceeding is a motion for a substitution of attorneys in the above-entitled cause. Mr. James Alva Watt, claiming authority to represent the petitioner, makes the motion. The solution of the question here presented is dependent upon the following state of facts:

One E. H. Knight, a creditor, commenced an action in the superior court of the city and county of San Francisco, Department No. 4, against the petitioner, People's Home Savings Bank and its directors, for the purpose of enforcing his demand, and asked that the board of directors be enjoined from the further transaction of business; that they be removed from office; that a receiver be appointed, and that the bank corporation be thrown into liquidation. Certain allegations 651 of plaintiff's complaint, charging fraud of the board of directors in the administration of the business of the corporation and insolvency of the bank, form the basis for the relief prayed for. In this action John F. Sheehan was by the court appointed receiver to take possession of the assets of the corporation, etc., and he retained James Alva Watt as his attorney and legal adviser in carrying on the business of the receivership. Thereafter, the petitioner in the above-entitled cause, to wit, the People's Home Savings Bank, made an application to this court for a writ of prohibition, asking that the proceedings of the superior court in the matter of the appointment of the receiver be annulled as being in excess of its jurisdiction. This application was made to the court by the petitioner through its regularly appointed attorneys, Messrs. Delmas and Shortridge. Thereafter a motion for a substitution of James Alva Watt as attorney for petitioner in the above-entitled cause, to act in the place and stead of Messrs. Delmas and Shortridge, was made. This motion was based upon a showing by affidavits to the effect that, subsequent to the inception of the prohibition proceeding, the directorate of the petitioner corporation had

been changed at an election held by the stockholders, and that the corporation petitioner, by its new board of directors, appointed said Watt attorney for the corporation in the above-entitled cause, and revoked the authority of Messrs. Delmas and Shortridge to act for it in any litigation then pending.

The legality of Watt's appointment as attorney for the bank depends upon the validity of the election of the board of directors appointing him, and the only serious question presented, as to the validity of such election, involves the right of a person not a stockholder to participate in the election by virtue of his position as a proxy of a *bona fide* stockholder, and to this question we shall direct our attention.

While it is provided by section 312 of the Civil Code that stockholders of corporations may be represented at ⁶⁵² all elections by proxies, yet the by-laws of the petitioner bank provide that no proxy shall be voted by any one not a stockholder of the corporation, and it is upon the validity of such by-law that the merits of this case hinge. It is suggested in argument of counsel that all banking corporations have a by-law of similar import; but, notwithstanding this general practice, we have arrived at the conclusion, after careful consideration, that the making of such a law is without the power of the corporation. Corporations have no power to create by-laws that are unreasonable in their practical application, or that are violative of the statute of the state; and we think this by-law an infringement upon the statute, and a most substantial limitation upon the rights of stockholders granted by section 312 of the Civil Code. That section is broad in its terms, and when it says that a stockholder in a corporation may appoint a proxy—an attorney in fact—to represent him at elections held by the corporation, in the absence of limitations in the law, it must be held that the statute gives him the right to name an attorney in fact of his own selection. Any other construction would entirely nullify all benefits intended to be conferred by its provisions. To declare that though the statute in general terms gives all stockholders of corporations the right to vote by proxy, yet the corporation, by its by-laws, has the power to say who that proxy shall be, is to give the corporation full power to throttle the statute.

The stockholders of many of our corporations are limited in number, and the case would undoubtedly often arise

where the absent stockholder, desirous of being represented at an election, would be unable to find a friend among them in whom to trust his interests. The statute contemplates no such conditions, and neither says nor intended to say that such a stockholder would be deprived of his right to vote by proxy. If you may limit by by-law the right of holding a proxy to stockholders, you may limit it to directors, or the president, or the secretary, and thus the interests in control ⁶⁵³ would have the power to compel the minority interests, if unable to be present in person, to be represented by the very interests to which they are opposed, and to reinstate in office the very men whose election they desire to defeat. The principle of cumulative voting has been authorized and approved in the interests of minority representation, yet this by-law squarely strikes at this principle which has been so carefully fostered. The substantial rights of a stockholder under the law cannot be taken from him, or even abridged by the by-laws. The right to vote by proxy is a most substantial right, and this by-law handicaps this right out of all usefulness.

While no authority for or against the principles we have here declared was cited by counsel upon the elaborate argument of the case, we had no doubt at the time that they rested upon solid grounds, and, since the submission of the cause, our investigation has brought to light a recent case fully in line with all that we have said upon the question. The principle here involved was the sole question there involved, and, in an opinion covering the entire ground, the court there said: "It has not restricted the right of the stockholder to select any person whom he may consider to be advisable for that object, to vote under his authority upon his shares as a stockholder. In this respect the largest liberty has been secured and provided for the stockholders, and, being entirely unrestrained by the legislature, this privilege was maintained by the authority of the law. Without having so declared expressly, the clear implication of the section is, that it was not intended to impose any restriction whatever upon the stockholder as to the person he should be at liberty to select to act under his proxy, and, the statute having in this manner created this right in as general a manner as it did, the trustees of the corporation were not at liberty to restrict or declare by their by-laws that it should not be so used": *Matter of Lighthall Mfg. Co.*, 47 Hun, 258.

Section 303 of the Civil Code provides: "A corporation ⁶⁵⁴ may by its by-laws, where no other provision is especially made, provide for: . . . 8. The mode of voting by proxy."

This provision does not give the corporation power to pass the by-law here assailed. It refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, as that the authorization must be in writing, properly witnessed, acknowledged, filed with the records, etc. In creating this provision it was not in the mind of the legislature to curtail the right of voting by proxy, but rather that such right might be exercised by stockholders within any reasonable restrictions which the corporation deemed proper to incorporate into their by-laws. The statute gives to the corporation the power to regulate the exercise of the right, but no power to either qualify or limit the right, and certainly no power to so shackle the right as to result in its nullification.

As a second ground of opposition to the granting of the motion for substitution it is insisted that James Alva Watt, by reason of his relations to the respondent as attorney, is disqualified to represent the petitioner in the prohibition proceeding. We attach but little importance to this contention, and do not deem it necessary to enter into a discussion of the questions, namely: 1. Are the interests of the receiver and the bank antagonistic? or 2. Is Watt attorney for the respondent in the above-entitled cause? The conclusion we have arrived at upon the preceding question discussed declares the business relations theretofore existing between the bank and its attorneys, Messrs. Delmas & Shortridge, were severed by virtue of the action of the newly and legally elected board of directors, and such being the case the attorneys opposing this motion stand before us as strangers to the proceeding, having no interest or standing in the litigation; and we are unable to see that it is of any concern to them who represent the various parties in this proceeding. As to Mr. Watt's conduct in the litigation, all that he has done has been open ⁶⁵⁵ and upon the record. There has been no concealment, no imposition practiced upon the court, but, upon the contrary, all that has been done in the past, and all that he proposes to do in the future, he has done, and proposes to do, under a claim of right, supported by the law. These things being so, until some party to the litiga-

tion objects, we will not investigate. If all parties to the litigation are satisfied we know of no proper party to object. We might suggest in conclusion that Mr. Watt states in open court that he desires to be substituted as attorney for the petitioner bank in order that he may dismiss the prohibition proceeding. The bank retains him as its attorney to dismiss the proceeding, and there is no reason why it has not the right so to do. Such a dismissal in no aspect of the case prejudices the interests of the respondents, and the bank, the petitioner, has the right to dismiss its petition if it deem such the proper course.

The motion for a substitution as prayed for is granted.

McFARLAND, J., VAN FLEET, J., HARRISON, J., and BEATTY, C. J., concurred.

CORPORATIONS—VOTING BY PROXY.—A by-law enacted by a private corporation, authorizing the stockholders at their meetings to vote by proxy, is valid, if the charter either expressly or by legal implication, confers the power to make such a by-law; otherwise it is void: *Taylor v. Griswold*, 14 N. J. L. 222; 27 Am. Dec. 33; *Commonwealth v. Brighthurst*, 103 Pa. St. 134; 49 Am. Rep. 119. Compare discussion of cases, in monographic note to *Taylor v. Griswold*, 27 Am. Dec. 60–63, on voting by proxy.

A CLIENT HAS A RIGHT TO CHANGE HIS ATTORNEY: See monographic note to *Board of Commrs. v. Younger*, 87 Am. Dec. 169; *Walton v. Sugg*, Phill. (N. C.) 98; 93 Am. Dec. 580.

DISCONTINUANCE OF ACTION.—A party has a right, both in legal and equitable actions, and either before or after issued joined, and without leave of court, to discontinue his action except as restricted by statute: See note to *McLeod v. Bertschy*, 14 Am. Rep. 755.

LIMITATIONS ON THE POWER OF PRIVATE CORPORATIONS TO ENACT BY-LAWS.—The subject of by-laws is discussed in the monographic note to *Sayre v. Louisville etc. Assn.*, 85 Am. Dec. 617–622, on what by-laws a private corporation aggregate may adopt; and questions as to the validity and effect of the constitution and by-laws of voluntary and charitable associations are discussed in the monographic note to *Austin v. Searing*, 69 Am. Dec. 671–678. The object of this note is not to show what constitutes a valid by-law, but to show what by-laws a private corporation does not have power to enact. The office of a by-law is to regulate the conduct and define the duties of the members towards the corporation and between themselves. So far as its provisions are in the nature of a contract the parties thereto are the members as between themselves; or the corporation upon the one side and its individual members upon the other. The right of any third person, stranger to the corporation, to establish a legal claim through such a by-law, must, therefore, necessarily depend upon the general principles applicable to express contracts: *Flint v. Pierce*, 99 Mass. 68; 96 Am. Dec. 691; *American Livestock Co. v. Chicago Livestock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 385. The right of a corporation to make by-laws is unquestionable, but they must be conformable and subordinate to its charter. They must also be reasonable: *St. Luke's Church v. Matthews*, 4 Desaux. Eq. 578; 6 Am. Dec.

619; *American Livestock Co. v. Chicago Livestock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 385. Unless a by-law is reasonable it is void, and a court will not enforce it; all such by-laws as are vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation are void: *Cartan v. Father Mathew etc. Soc.*, 3 Daly, 20; *People v. Medical Society*, 24 Barb. 570; *People v. Fire Department*, 31 Mich. 458; *Palmetto Lodge v. Hubbell*, 2 Strob. 457; 49 Am. Dec. 604; *City of Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196. The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the state. It can make no rule contrary to law, good morals, or public policy: *Sayre v. Louisville etc. Assn.*, 1 Duvall, 143; 85 Am. Dec. 613; *People v. Medical Society*, 24 Barb. 570; *American Livestock Co. v. Chicago Livestock Exchange*, 143 Ill. 210; 36 Am. St. Rep. 385. The power of a corporation to pass by-laws regulating stock, or restricting the manner of voting it, must be consistent with its charter: *Chandler v. Northern Cross R. R. Co.*, 18 Ill. 190. The question as to whether a by-law is reasonable is to be decided by the court: *Commonwealth v. Worcester*, 3 Pick. 462; *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40; 23 Am. St. Rep. 506. Another important feature about by-laws is, that they have no *ex post facto* operation, but apply only to future cases: *Howard v. Savannah*, T. U. P. Charlt. 173; *People v. Crockett*, 9 Cal. 112. *Ex post facto* laws are no more lawful for corporations than for states: *People v. Fire Department*, 31 Mich. 458; *Great Falls Ins. Co. v. Harvey*, 45 N. H. 292.

In the absence of a law or custom to the contrary, the power to make by-laws resides in the members of the corporation at large: *Martin v. Nashville Bldg. Assn.*, 2 Coldw. 418; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4; *State v. Curtis*, 9 Nev. 325. But the body at large may delegate the power to a select body, which then represents the whole community, and a majority of that body will constitute a quorum: *Ex parte Willcocks*, 7 Cow. 402; 17 Am. Dec. 525; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. 124; 43 Am. Dec. 457. The power to enact by-laws for a corporation does not reside in the board of directors, but in the aggregate body of the stockholders. The directors have no power to make by-laws without special authority: *State Savings Assn. v. Nixon-Jones etc. Co.*, 25 Mo. App. 642; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Morton Gravel Road Co. v. Wysong*, 51 Ind. 4. If the charter prescribes any formality as to the adoption of by-laws it must be observed: *Dunston v. Imperial Gas Light Co.*, 3 Barn. & Adol. 125. A by-law is void if contrary to the charter of the company: *Martin v. Nashville Bldg. Assn.*, 2 Coldw. 418; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Bergman v. St. Paul Mut. etc. Assn.*, 29 Minn. 275; *State v. Curtis*, 9 Nev. 325; *Presbyterian Mut. Assn. Fund v. Allen*, 106 Ind. 593; or contrary to a law of the state or to the constitutional law of the land: *People v. Fire Department*, 31 Mich. 458; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Butchers' Beneficial Assn.*, 35 Pa. St. 151; or in restraint of trade: *Sayre v. Louisville Union etc. Assn.*, 1 Duvall, 143; 85 Am. Dec. 613; or which tends to create a monopoly: *City of Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196; *Moore v. Bank of Commerce*, 52 Mo. 377; *Clark v. Le Creu*, 9 Barn. & C. 52. A by-law in contravention of the common law is generally held to be void: *Hayden v. Noyes*, 5 Conn. 391; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470.

Thus, a by-law of a town, prohibiting all persons, except its own inhabitants, from taking shellfish in a navigable river, within the limits of such town, being in contravention of a common right, is void: *Hayden v. Noyes*, 5 Conn. 391. But in Missouri it is held that a rule different from the com-

mon law, and established by the by-law of a corporation, does not render such by-law invalid: *Goddard v. Merchants' Exchange*, 9 Mo. App. 290; affirmed in same case, 78 Mo. 609. A by-law which unreasonably interferes with the free exercise of the right to transfer stock is void as being in restraint of trade: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; *Moore v. Bank of Commerce*, 52 Mo. 377; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476. This is so where a by-law of a bank prohibits the alienation of stock therein or puts restrictions thereon, because the right of alienation is an incident of property: *Moore v. Bank of Commerce*, 52 Mo. 377. While a by-law of a corporation respecting the transfer of stock may sometimes be enforced as a reasonable regulation for the protection of the corporation against worthless stockholders, it cannot, therefore, be made available to defeat the rights of third persons, as where such a by-law provides that transfers of stock shall not be valid unless approved by the board of directors: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398. The power contained in the charter of an incorporated company "to regulate the transfer" of stock by by-laws does not include the power to restrain transfers or prescribe to whom they may be made. It merely prescribes the formalities to be observed in making them. Such a power will not prevent a party from selling this stock even to an insolvent person: *Chouteau Spring Co. v. Harris*, 20 Mo. 382. A by-law that no person shall exercise the art of a painter within the city of London, not being "free of the company of painters," is in restraint of trade and void, unless there is a special custom to warrant it: *Clark v. Le Creu*, 9 Barn. & C. 52. By-laws of a society forbidding a member to work at his trade at such prices as he may choose to accept, and compelling him to join in a "strike" by punishing him for refusing to do so, are void as against public policy: *People v. New York etc. Society*, 3 Hun, 361. A by-law that will disturb a vested right of any shareholder in a corporation is clearly unauthorized and void: *Gray v. Portland Bank*, 3 Mass. 364; 3 Am. Dec. 156; *People v. Crockett*, 9 Cal. 113; *People v. Fire Department*, 31 Mich. 458. When neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be created by any by-law or vote of the corporation: *Trustees v. Flint*, 13 Met. 539; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; or, expressed somewhat differently, a corporation cannot by a mere by-law, in the absence of a statute upon the subject, bind stockholders not assenting thereto for the payment of debts of the corporation: *Flint v. Pierce*, 99 Mass. 68; 98 Am. Dec. 691; and monographic note to *Freeland v. McCullough*, 43 Am. Dec. 694. A mutual benefit society cannot entirely take away the right to invoke the aid of the courts in enforcing claims existing in favor of its members upon contracts. A member is not concluded, by an adverse decision on his claim by the highest power in the society, from resorting to a court of law; and the society cannot, by provisions in its constitution, by-laws, or relief fund laws, deprive him of this right: *Bauer v. Samson Lodge, K. P.*, 102 Ind. 262; *Supreme Council C. F. v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298. In the next case to the last one cited it is held that a custom that a party shall not sue in a court of justice for money due him on a contract is not valid. So, if the statute gives the stockholders of a corporation the power to elect its directors, the corporation cannot, by its by-laws, either give or take it away: *Brewster v. Hartley*, 37 Cal. 15, 24; 99 Am. Dec. 237. The principle of such cases is that the powers of a

corporation being derived from the law, no by-law can abridge or enlarge those powers: *Brewster v. Hartley*, 37 Cal. 15; 99 Am. Dec. 237.

A by-law of an insurance company, providing that any suit on a policy should be brought in a certain county, is not binding on the assured: *Nuts v. Hamilton Mut. Ins. Co.*, 6 Gray, 174. It is otherwise as to a by-law limiting the time within which suit must be brought: *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray, 596; *Wilson v. Aetna Ins. Co.*, 21 Vt. 99; *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. 280. A by-law of a secret order or association which insures the lives of its members, making initiation necessary to membership and the enjoyments of the benefit attaching thereto, is reasonable, and calculated to promote the objects and welfare of the order or association, and is not void as being unreasonable, or opposed to law or public policy: *Matkin v. Supreme Lodge K. of H.*, 82 Tex. 301; 27 Am. St. Rep. 886.

So with a by-law prohibiting the publication of the regular news dispatches of any other news association covering like territory, and organized for a like purpose: *Matthews v. Associated Press*, 136 N. Y. 333; 32 Am. St. Rep. 741. A by-law of a building association, providing that every stockholder delinquent in the payment of his monthly dues and interest "shall forfeit and pay the additional sum of ten cents monthly on each and every dollar due by him," is, in the absence of any special statutory authority in the association to impose fines, oppressive, extortionate, and unreasonable, and therefore void: *Lynn v. Freemansburg etc. Assn.*, 117 Pa. St. 1; 2 Am. St. Rep. 639. So with a by-law providing for a forfeiture of benefits, in a mutual benevolent society, for a period of three months from and after the liquidation of any arrears of dues by a member: *Cartan v. Father Mathew etc. Soc.*, 3 Daly, 20. A by-law by the directors excluding one of them from examining the corporate books is void: *People v. Throop*, 12 Wend. 163; so with a by-law restricting the right of members of a church to vote as authorized by statute: *People v. Phillips*, 1 Denio, 388; or a by-law imposing penalties for past acts: *People v. Fire Department*, 31 Mich. 458. A by-law that transfers of stock are subject to the approval of the directors: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; or the approval of the president is void: *Sargent v. Franklin Ins. Co.*, 8 Pick. 90; 19 Am. Dec. 306. So with a by-law authorizing the corporation to sue a subscriber for the difference between the subscription and the price for which the stock sold on forfeiture: *Jay Bridge Co. v. Woodman*, 31 Me. 573; *Kennebec R. R. Co. v. Kendall*, 31 Me. 470. A by-law compelling members of an exchange to submit their controversies to arbitration on pain of expulsion or suspension is void: *State v. Merchants' Exchange*, 2 Mo. App. 96. So with a by-law enlarging the liability of stockholders for debts of the corporation: *Trustees etc. v. Flint*, 13 Met. 539; or one compelling stockholders to retire a part of their stock: *Bergman v. St. Paul etc. Assn.*, 29 Minn. 275; or one prohibiting the use of the company's canal on Sundays: *Calder etc. Nav. Co. v. Pilling*, 14 Mees. & W. 76; or one restricting the members as to their fishing business: *Adley v. Whitstable Co.*, 17 Ves. 215; 19 Ves. 304. A by-law of a bank that mistakes in pass-books must be corrected at once does not bind a depositor: *Mechanics' etc. Bank v. Smith*, 19 Johns. 115; and a by-law which limits or regulates the corporate powers which the charter confers on the directors may be disregarded by them: *Union etc. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 375. A by-law restricting the number of apprentices which members may have is void: *Rex v. Coopers' Co.*, 7 Term Rep. 543; *Rex v. Tappenden*, 3 East

186. So with one restricting the transfer of seats in an exchange: *Ritterband v. Baggett*, 10 Jones & S. 556; or one which prohibits members from working with persons who are not members: *Thomas v. Mutual etc. Union*, 49 Hun, 171.

The authority to forfeit shares for nonpayment of the subscription cannot be created by a by-law: *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429; *Budd v. Multnomah St. Ry. Co.*, 15 Or. 413; 3 Am. St. Rep. 169; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495, 506; *Kirk v. Norvill*, 1 Term Rep. 118. Such a forfeiture would be wholly void, and transfers based thereon would confer no rights upon the transferee: *In re Long Island R. R. Co.*, 19 Wend. 37; 32 Am. Dec. 429. But if such a power is conferred by a by-law adopted at a meeting of the stockholders, a stockholder whose stock has been declared forfeited under the by-law, and who is shown to have assented to the by-law, will not be heard to question the validity of the forfeiture, as he is estopped: *Lesseps v. Architects' Co.*, 4 La. Ann. 316.

The question whether a corporation may, by a by-law, create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation is not settled. There are cases sustaining the validity of such a by-law: *People v. Crockett*, 9 Cal. 112; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; 100 Am. Dec. 358; *Spurlock v. Pacific R. R.*, 61 Mo. 319; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Pendergast v. Bank of Stockton*, 2 Saw. 108.

But it seems to be clear that a by-law of the usual purport, forbidding a transfer by a stockholder in debt to the corporation, and making all indebtedness a lien on the debtor's stock until paid, cannot affect subsequent purchasers for value without notice: *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; 30 Am. Rep. 398; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Driscoll v. West Bradley etc. Mfg. Co.*, 59 N. Y. 96; *Pilot v. Johnson*, 33 La. Ann. 1286; *Bank v. Lanier*, 11 Wall. 369; *Bank of Atchison County v. Durfee*, 118 Mo. 431; 40 Am. St. Rep. 396, and note 405.

And this is upon the principle that restrictions upon the transfers of stock must have their source in legislative enactment; that the corporation itself cannot create these impediments by mere by-laws; and that the power of corporations to make by-laws for the transfer of their stock does not include the power to create liens thereon affecting purchasers for value without notice: *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249; *Anglo-Californian Bank v. Grangers' Bank*, 63 Cal. 359; *Conklin v. Second Nat. Bank*, 45 N. Y. 655.

With respect to national banks, it has been held that a power to regulate the transfer of stock, or manner of transferring stock, is sufficient to authorize a valid by-law prohibiting the transfer of stock until all debts due from the stockholder to the bank are paid, and creating a lien on the stock for such indebtedness: *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; 11 Am. Rep. 253; *Knight v. Old Nat. Bank*, 3 Cliff. 429; *Young v. Vough*, 23 N. J. Eq. 325; but it is now settled that a by-law giving it a lien on the stock of its debtors is not "a regulation of the business of the bank, or a regulation for the conduct of its affairs," within the meaning of the National Banking Act of 1864; and that the bank has no power to make such a by-law, and cannot, therefore, acquire such a lien: *Bullard v. Bank*, 18 Wall.

589; *Bank v. Lanier*, 11 Wall. 369; *Conklin v. Second Nat. Bank*, 45 N. Y. 655.

Divisibility—Alteration, Amendment, or Repeal.—A by-law may be good in part and void for the rest: *Royers v. Jones*, 1 Wend. 237; 19 Am. Dec. 493; but where part of a by-law is void and the whole forms an entirety, so that the part which is void influences the whole, the entire by-law is void: *State v. Curtis*, 9 Nev. 325. If, however, the by-law is divisible, the invalidity of part does not invalidate the remaining part: *Amesbury v. Bowditch Mut. Fire Ins. Co.*, 6 Gray, 590; *Shelton v. Mayor*, 30 Ala. 540; 68 Am. Dec. 143. Although the power is reserved to a corporation by its charter to alter, amend, or repeal its by-laws, it cannot repeal a by-law so as to impair rights which have been given, and become vested by virtue of the by-law: *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 182; affirming same case, 12 Hun, 53. It is true that there are no particular rules in regard to the method of enacting, amending, or repealing by-laws; that they need not be written: *Union Bank v. Ridgely*, 1 Har. & G. 324, 413; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; 38 Am. Rep. 330; and may be modified by usage: *Henry v. Jackson*, 37 Vt. 431; that the power to make by-laws implies power to repeal them: *King v. Ashwell*, 12 East, 22; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 182; affirming same case, 12 Hun. 53; and that a by-law may be repealed by a resolution inconsistent with it: *Royal Bank case*, L. R. 4 Ch. 252; but as the power of a corporation to make a by-law is limited to such as are not inconsistent with the constitution and the law, so must the power to alter have the same limit. No alteration can, therefore, be made which will infringe a right already given and secured by the contract of the corporation. An alteration of a by-law is a *pro tanto* repeal. It is but the making of another upon the same matter. If the first must be reasonable and in accord with principles of law, so must that which alters it. If, then, the power is reserved to alter, amend, or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws, agreeable to law. But a by-law which disturbs vested rights is not such a law, although it may be regularly passed by a majority of the stockholders: *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159, 182; affirming same case, 12 Hun. 53. Mutual benefit societies have the right to alter, amend, or repeal their laws, or to enact others consistent with the purpose for which they are organized, but they cannot so exercise this right as to operate as a repudiation of their obligations, or to work a forfeiture of rights previously vested in their members: *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271; 29 Am. St. Rep. 603; *Supreme Lodge K. P. v. Knight*, 117 Ind. 489. If articles of association of a company prohibit the union or consolidation of the company with any other, without the consent of a majority of the stockholders, but also authorize amendments of the articles by a concurrent vote of two-thirds of the executive committee, and a majority of the trustees, the authority to amend must be held not to take away from the stockholders the power to prohibit the merger of the company with any other company—a power expressly reserved and intended for their own protection. In such a case, a merger of the company in another, without the consent of the stockholders, is, as to those who do not agree, utterly beyond the powers of the executive committee and directors: *Blatchford v. Ross*, 54 Barb. 42; 5 Abb. Pr., N. S., 434; 37 How. Pr. 110. But an amendment of a by-law which merely changes the number necessary to constitute a quorum of a board of directors does not alter another by-law which requires a vote of two-thirds of the directors to suspend or remove an officer of the company: *Stockton v.*

Harmon, 32 Fla. 312. If a member of a benefit association is entitled to, and has been paid, weekly benefits at a rate fixed by its charter, it cannot, by subsequent amendment to its by-laws, reduce the amount of benefits to which he is entitled under such charter: *Becker v. Berlin Beneficial Society*, 144 Pa. St. 232; 27 Am. St. Rep. 624.

The conclusion from the cases is that a by-law of a corporation must be reasonable and consistent with law, or it is void; that the question of reasonableness is one for the court, and not for the jury; that the courts will, when called upon, relieve a member of the corporation from the operation of all unreasonable by-laws; that by-laws are not binding on third persons dealing with the corporation, and who have no notice, but operate simply as a rule for the orderly transaction of business within the corporate body; that by-laws do not operate *ex post facto*, but *in futuro*; and that these principles apply to municipal corporations as well as to private corporations.

CHAPMAN v. STATE.

[104 CALIFORNIA, 690.]

LIABILITY OF STATE FOR NEGLIGENT ACTS OF ITS OFFICERS.—In the absence of a statute voluntarily assuming such liability the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state.

CONSTITUTIONAL LAW—GIFTS, PROHIBITION OF—PREVENTS LEGISLATURE FROM CREATING LIABILITY FOR NEGLIGENCE.—Under a constitutional provision forbidding the legislature from making any gift of public money, it has no power to create a liability against the state for any past act of negligence on the part of its officers.

LIABILITY OF STATE FOR BREACH OF CONTRACT—NEGLIGENCE OF HARBOR COMMISSIONERS IN FAILING TO KEEP WHARF IN REPAIR.—If a lot of coal is received at a public wharf, under the jurisdiction of the state harbor commissioners, in consideration of wharfage and dockage paid to them, and to be delivered on such wharf for removal therefrom, but the coal is lost by the breaking away of the wharf, through the neglect of such officers to keep it in repair, there is a breach of contract on the part of the state, and it is liable in an action for damages for loss of the coal, though it may not be liable for the mere negligence of the harbor commissioners.

CONTRACTS OF STATE—RULES APPLICABLE TO.—The state in all of its contracts and dealings with individuals is governed by the same rules applicable in determining the rights of private citizens contracting and dealing with each other.

WHARFINGERS — DUTY AND LIABILITY — NEGLIGENCE.—A wharfinger is bound to return or deliver the goods according to his contract, which impliedly binds him to exercise ordinary care for their preservation and safety. He is liable for breach of his contract, in case of their loss by reason of an unsafe condition of the wharf, which could have been ascertained and remedied by the use of ordinary care.

LIABILITY OF WHARFINGER FOR LOSS—HOW ENFORCED—ASSUMPSIT.—At common law the liability of a wharfinger for breach of contract by neg-

ligence causing the loss of the goods intrusted to him was enforceable by an action of *assumpsit*. Under our practice the owner or consignee may sue upon the contract for the damages sustained by such negligence.

CONSTITUTIONAL LAW—RIGHT TO SUE STATE UPON CONTRACT—NEW REMEDY FOR PREVIOUS LIABILITY.—If goods delivered at a public wharf under the jurisdiction of the harbor commissioners are lost, the state is liable, and, though the only existing remedy is to present a claim to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same, it is not unconstitutional for the legislature to afterward give the right to sue the state upon its contract, as it does not thereby create any liability or cause of action against the state where none existed before.

CLAIM AGAINST STATE—ACTION OF BOARD OF EXAMINERS IN REJECTING NOT CONCLUSIVE.—The action of the board of examiners in rejecting a claim for breach of contract on the part of the state is no bar to an action allowed by law upon the rejected claim.

THE GENERAL LANGUAGE OF THE OPINION IN A CASE MUST BE CONSTRUED with reference to the particular facts then before the court.

Dodge & Fry, for the appellant.

Attorney General William H. H. Hart, and Deputy Attorney General Oregon Sanders, for the respondent.

691 DE HAVEN, J. Action for damages brought by the plaintiff as assignee of the firm of "John Rosenfeld's Sons." In the superior court a demurrer to the complaint was sustained, and judgment thereupon rendered 692 in favor of the defendant. The complaint, omitting merely formal and immaterial averments, may, as against a general demurrer, be construed as alleging, in substance, that on August 10, 1891, the defendant, in consideration of wharfage and dockage charges, paid to its officers, the state board of harbor commissioners, received upon one of its public wharves, situate in the city of San Francisco, and under the jurisdiction and control of the state board of harbor commissioners, about one hundred and thirty tons of coal belonging to the assignors of plaintiff, and to be removed by them from such wharf; and that on said day a large portion of the wharf on which this coal was placed broke and gave way "by reason of the negligence, omission, and carelessness of defendant, its officers, and agents, . . . in failing and neglecting to keep said wharf in good and sound condition and repair"; and all the coal of plaintiff's assignors then on the wharf was sunk in the bay of San Francisco, and became a total loss, to their damage in the sum of twelve hundred and sixty-six dollars and forty-seven cents, the alleged value of said coal.

The complaint further alleges that a claim for the damages so sustained was duly presented to the state board of examiners for allowance, and the same was by said board rejected on September 13, 1893. The prayer of the complaint is for a judgment against defendant for the sum of twelve hundred and sixty-six dollars and forty-seven cents, and interest thereon from August 10, 1891. The demurrer was upon the general ground that the complaint does not state facts sufficient to constitute a cause of action. And also set forth, as a special ground, that "the said complaint shows upon its face that the claim against the state, which is the subject matter of the action of plaintiff, was duly and legally presented to the state board of examiners of this state prior to the commencement of this action for allowance, and was by said board rejected and disallowed, and the ~~693~~ said action of said board in the premises has never been reversed, but remains in full force and effect."

1. It is claimed by the plaintiff that he is entitled to maintain this action under the permission and authority given by the act authorizing suits against the state, approved February 28, 1893 (Stats. 1893, p. 57). The first section of this act provides as follows: "All persons who have, or shall hereafter have, claims on contract or for negligence against the state, not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment."

The cause of action set forth in the complaint arose prior to the passage of the act just referred to, and it is argued by the attorney general that at the time when the coal belonging to the assignors of the plaintiff was lost, the state was not liable for the damage occasioned by said loss, and growing out of the alleged negligence of its officers in charge of the wharf mentioned in the complaint; and that the act should not be construed as intended to create any liability against the state for such past negligence. It is well settled that, in the absence of a statute voluntarily assuming such liability, the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state: *Bourn v. Hart*, 93 Cal. 321; 27 Am. St. Rep. 203; Story on Agency, sec. 319.

It is also true that under section 81 of article 4 of the constitution of this state, which forbids the legislature from making any gift of public money or other thing of value to any person, the legislature has no power to create a liability against the state for any such past act of negligence upon the part of its officers.

If, therefore, the present action, based as it is upon a loss accruing before the enactment of the statute of February 28, 1893, authorizing suits against the state, is to ^{be} regarded as one for the recovery of damages arising out of the negligence of the officers of the state in the discharge of a strictly governmental duty, it cannot be sustained; but we are clearly of the opinion that the cause of action alleged in the complaint is not of this character. It is not founded upon negligence constituting a tort, pure and simple and unrelated to any contract, but is substantially an action for damages on account of the alleged breach of a contract.

The facts stated in the complaint show that the defendant, in consideration of wharfage paid to it, received upon one of its public wharves the coal belonging to plaintiff's assignors, and to be delivered to them on such wharf for removal therefrom. A wharfinger is one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf, and the matters alleged in the complaint show a contract of the latter character, and the state is bound thereby to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract. The principle that a state is bound by the same rules as an individual in measuring its liability on a contract is well expressed by Allen, J., in his concurring opinion in the case of *People v. Stephens*, 71 N. Y. 549, in which he said: "The state in all its contracts and dealings with individuals must be adjudged and abide by the rules which govern in determining the rights of private citizens contracting and dealing with each other. There is not one law for the sovereign, and another for the subject. But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer,

contractor, and suitor": 695 See, also, *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624.

What, then, was the nature and extent of the obligation assumed by the state when, in consideration of the wharfage paid by them, it received the coal of plaintiff's assignors upon its wharf?

"The wharfinger is bound to return or deliver the goods according to his contract": Edwards on Bailments, 3d ed., sec. 362. A wharfinger is impliedly bound by his contract as such to exercise ordinary care for the preservation and safety of property intrusted to him (Edwards on Bailments, 3d ed., sec. 359), and this imposes upon him the duty to exercise ordinary care to ascertain the condition of his wharf, that he may know whether it is reasonably safe for the purposes for which he hires it; and, if merchandise is received by him upon a wharf which is unsafe, and is thereby lost, so that he cannot deliver it according to his contract, the wharfinger is liable therefor if ordinary care would have enabled him to know the condition of his wharf; and such negligence on his part will be treated as a failure to exercise ordinary care for the safety of the property intrusted to him. This negligence, however, and the consequent loss of the goods intrusted to him, would be a breach of the terms of his contract, and his liability therefor could have been enforced at common law by an action of *assumpsit*: 1 Chitty on Pleading, *114; *Baker v. Liscoe*, 7 Term Rep. 171; and under our practice the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence. "The wharfinger's responsibility begins as soon as he acquires the custody of the goods, and ends when he has fulfilled his express or implied contract with respect to both": Edwards on Bailments, sec. 357.

And the supreme court of Washington in the case of *Oregon Improvement Co. v. Seattle Gaslight Co.*, 4 Wash. 634, in passing upon the question of the liability of a wharfinger upon his contract as such, by reason of his wharf giving way and precipitating into the waters 696 beneath, a quantity of shale which had been received thereon, said: "This was a contract of bailment. The contract was proven, the loss was proven, and the negligence of respondent was proven, and the measure of the damages is the value of the shale."

We are entirely satisfied that plaintiff's cause of action, as alleged in the complaint, arises upon contract, and that the

liability of the state accrued at the time of its breach, that is, when the coal was lost through the negligence of the officers in charge of the state's wharf, although there was then no law giving to the plaintiff's assignors the right to sue the state therefor. At that time the only remedy given the citizen to enforce the contract liabilities of the state was to present the claim arising thereon to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same; but the right to sue the state has since been given by the act of February 28, 1893, and, in so far as that act gives the right to sue the state upon its contracts, the legislature did not create any liability or cause of action against the state where none existed before. The state was always liable upon its contracts, and the act just referred to merely gave an additional remedy for the enforcement of such liability, and it is not, even as applied to prior contracts, in conflict with any provision of the constitution.

"The fact that the state is not subject to an action in behalf of a citizen does not establish that he has no claim against the state, or that no liability exists from the state to him. It only shows that he cannot enforce against the state his claim, and make it answer in a court of law for its liability. What is made out by this objection is not that there is no liability and no claim, but that there is no remedy": *Coster v. Mayor of Albany*, 43 N. Y. 407.

2. It is further argued in behalf of the state that the rejection of plaintiff's claim by the state board of examiners has the effect of a judgment, and constitutes a bar to this action; and in support of this contention the ⁶⁹⁷ case of *Cahill v. Colgan* (Cal., Nov. 22, 1892), 31 Pac. Rep. 614, is cited. That case is not authority for such a proposition. The court there decided that when a claim had been presented to the state board of examiners and approved, and an appropriation made by the legislature to pay it, the approval by the board of examiners was conclusive upon the controller as to the value of the services rendered by the claimant, and the amount to which he was entitled; and the general language found in the opinion in that case, as to the conclusive effect of the approval or rejection of a claim by the state board of examiners, must be construed with reference to the particular facts then before the court. But a sufficient answer to the contention of the defendant on this point is that the act, under the authority of which this suit is brought, con-

templates that claims against the state shall first be presented to the state board of examiners for allowance, and, as we construe its language, it is only on claims so presented, and "not allowed by the state board of examiners," that the state gives its consent to be sued; and certainly as to claims which have been approved by that board there could be no necessity for such a remedy.

Judgment reversed, with directions to overrule the demurrer to the complaint.

FITZGERALD, J., GAROUTTE, J., MCFARLAND, J., HARRISON, J., VAN FLEET, J., and BEATTY, C. J., concurred.

A STATE IS NOT LIABLE FOR THE NEGLIGENCE OR MISFEASANCE of its officers or agents, except when such liability is voluntarily assumed by its legislature: *Bourn v. Hart*, 93 Cal. 321; 27 Am. St. Rep. 203, and note.

CONTRACTS OF A STATE are interpreted as the contracts of individuals are, and controlled by the same laws: *Carr v. State*, 127 Ind. 204; 22 Am. St. Rep. 624.

A WHARFINGER IS A BAILEE FOR HIRE, and is bound to use ordinary care: See note to *Willey v. Allegheny City*, 4 Am. St. Rep. 612. An action lies against him for damages occasioned by his negligence: See note to *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 30 Am. St. Rep. 692.

THE LEGISLATURE MAY AUTHORIZE THE PAYMENT OF A CLAIM AGAINST THE STATE, notwithstanding the lapse of time, if at the time when the claim was incurred the claimant could not have maintained any action against the state thereon: *O'Hara v. State*, 112 N. Y. 146; 8 Am. St. Rep. 726.

NO ONE CAN SUE THE STATE without its consent, and if this is given, the remedy prescribed must be pursued: *Cornwall v. Commonwealth*, 82 Va. 644; 3 Am. St. Rep. 121.

GENERAL EXPRESSIONS IN A JUDICIAL OPINION are to be taken in connection with the case in which they are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit in which the very point is presented for decision: *Wadsworth v. Union Pac. Ry. Co.*, 18 Col. 600; 36 Am. St. Rep. 309.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
DELAWARE

SEDGEWICK v. HOUSTON.

[9 HOUSTON, 112.]

BAIL IN CIVIL ACTIONS — AFFIDAVIT — WHEN MUST BE OBJECTED TO. —

An affidavit prescribed by statute to hold a defendant to bail in a civil action is a part of the process to bring him into court. Any objection to it on the ground of defect, deficiency, or irregularity may and must be taken advantage of by the defendant in the first instance before he has given bail or entered appearance. If he fails to do so he must be considered to have waived his objection, and neither he nor his bail can afterward avail himself of the objection.

ERROR. J. M. Houston brought suit against one C. C. Thackery, who gave bond to the sheriff for his appearance, and afterward perfected his bail by giving special bail, with W. D. Sedgewick as surety. Judgment was confessed in the suit against Thackery, a *capias ad satisfaciendum* was issued and returned *non est* against him, and a *scire facias* issued against Sedgewick, who pleaded that no affidavit, as required by law, had been filed by Houston in the suit against Thackery. A demurrer to this plea was sustained, and Sedgewick appealed by writ of error.

B. Nields and E. G. Bradford, for the plaintiff in error.

J. H. Rodney, for the defendant in error.

121 The COURT affirmed the decision of the court below, which was delivered by Houston, J., as follows:

“In my opinion the demurrer in this case must be sustained. The practice of the court of king’s bench in England, as stated by Mr. Tidd, in regard to affidavits required to hold to bail in a civil action, is as follows: ‘If there be no

affidavit, or if the affidavit be defective, or not duly filed, or if the sum sworn to be not indorsed, the court will discharge the defendant ¹²³ upon common bail.' And then he adds: 'But if the affidavit be merely informal the defendant cannot object to it, after he has voluntarily given a bail bond, put in or perfected bail above, taken the declaration out of the office, pleaded to the action, or let judgment go by default': 1 Tidd's Practice, 164. But notwithstanding he refers to no less than ten adjudged cases in support of this general proposition, I have not found that any one of them sustains the latter portion of it, or the qualification of it, on which the counsel for the defendant in this case relies, that it is only where the affidavit is informal or defective, and not where it is wholly wanting, as in this case, that the defendant can object to it after he has voluntarily given bail bond, put in or perfected bail above, taken the declaration out of the office, pleaded to the action, or let judgment go by default. On the contrary, we find that in the case of *Norton v. Danvers*, 7 Term Rep. 375, that at that term of the court of king's bench many applications were made to discharge defendants out of custody on filing common bail who had been arrested since the passing of a recent act of parliament for restraining for a limited time payments in cash by the Bank of England, which enacted that no person should be holden to bail unless the affidavit made for that purpose should contain not only every thing required by the statute 12 George I, c. 29, but also state that no offer has been made to pay the sum of money sworn to in notes of the said bank; this act not having been adverted to, and this requirement of it having been omitted in filing the affidavits before referred to in the many applications. It being a question of great importance the court did not decide it at first, but, on a subsequent day in the term, they thought themselves bound by the positive words of the act, and made most of the rules absolute for discharging the defendants out of custody, or for setting aside the bail bonds, but with costs. The contention of counsel against the rule in the case of *Norton v. Danvers*, 7 Term Rep. 375, was that the defendant had waived all objections to the bail bond: 1. Because he had not objected in the last term; and 2. Because he had voluntarily given the bail bond; the fact being that on receiving ¹²³ information that a writ had been taken out against him on the 27th of June last he gave the bail bond. The counsel for the rule con-

tended: 1. That the defendant had not waived his right to take advantage of the objection, either on account of the time that had elapsed since the bail bond was given, it having been given only a few days before the end of the last term; or on account of his having voluntarily given the bail bond, that having been given merely to prevent the arrest; 2. That this was a defect in the proceedings themselves which the defendant could not waive, and not simply an irregularity in the mode or time of proceeding.

“Lord Kenyon, C. J. ‘If any error appeared on the proceedings of the court I admit that the defendant could not waive without giving a release of error; and it has been doubted how far an error in law can be confessed; but the affidavit to hold to bail is only process to bring the party in, and, if he choose to waive any objection to that, he may do it; and in this case I think he has waived taking advantage of this objection. If, indeed, the defendant had been actually under arrest at the time, his consent to give a bail bond would not have been binding on him, because it might be considered as given under duress; but here he voluntarily gave this bail bond; and on that ground only my opinion is founded.’

“Rule discharged.”

But in this case the application of the defendant to be discharged on common bail was not refused by the court on the ground of a mere informality in the affidavit to hold to bail, nor was it predicted on any mere informality in it, but upon the ground distinctly recognized and ruled by the court in the decision of it that the affidavit to hold to bail is only process to bring the party in, and, if he choose to waive any objection to that, he may do it. For that is the broad and general principle ruled in the case by the court, although in that particular case they discharged the rule on ¹²⁴ the ground only that defendant had voluntarily given the bail bond without waiting for arrest.

From note *a* appended by the reporters to this case, page 376, it appears that length of time was afterward holden in *Fenwick v. Hunt* to be no waiver of the objection. But in a subsequent case, *Levy v. Daponte*, 7 Term Rep. 376 *n*, it was ruled that the defendant could not take advantage of the objection after he had pleaded.

But the broad principle announced in the case of *Norton v. Danvers* was afterward, on further consideration, approved

and affirmed by the same court in the case of *D'Argent v. Vivant*, 1 East, 380, upon a rule to show cause why the bail bond given to the sheriff by the defendant in the case should not be delivered up to be canceled, and an *exoneretur* entered on the bail piece, on the defendant's filing common bail, which rule was obtained on the ground of a defect in the affidavit made to hold the defendant to bail, the same having been made by the plaintiff without giving herself any addition, but only describing herself by the place of her abode. The facts were that the defendant, having been arrested by process returnable the first return of the term grounded upon this affidavit, put in bail on the 27th of January, and made this application on the next day but one, the 29th.

After Jervis had been heard in support of the rule, who relied on *Jarret v. Dillon*, 1 East, 18, and Barrow against the rule, who cited *Jones v. Price*, 1 East, 81, the court took time to consider the cases with a view to settle the practice in future; and now Lord Kenyon, C. J., delivered their opinion. After stating the rule and the facts above mentioned he proceeded as follows: "That the affidavit is defective for want of such addition cannot be disputed. The rule of court of Mich. 15, Car. 2, expressly requires 'that the true place of abode and true addition of every person who shall make affidavit in court here shall be inserted in such affidavit.' Several instances have lately occurred where defendants have been discharged on filing common bail, because the affidavit to hold to bail was defective in ¹²⁵ not stating the addition of the party making such affidavit as required by this rule of court. And the case of *Jarret v. Dillon*, 1 East, 18, in this court in the last term, the court, on argument by counsel, made a rule absolute for entering a common appearance for the defendant on a like defect in the affidavit to hold to bail. But it has been contended in the present case that, admitting the affidavit to hold to bail to be defective, yet the court ought not now to interpose, the application having been made too late, being the day after the defendant had put in bail; that this objection is to be considered in the nature of an objection to process, which the defendant may make before putting in bail or entering an appearance; but that by putting in bail a defendant waives every objection to the process. In the case which has already been alluded to of *Jarret v. Dillon*, 1 East, 18, in the last term, one objection made by the plaintiff

against the rule was, that it was not competent to the defendant to make any objection to any proceeding in the cause till he had appeared in court by putting in good bail; but the court, notwithstanding that objection, made the rule absolute, thereby clearly describing that this was to be considered as an objection to process which may be taken by a defendant before he has appeared or put in bail." And then, after reciting and reaffirming the ruling of the court in the case of *Norton v. Danvers*, 7 Term Rep. 375, he refers to the case of *Chapman v. Snow*, 1 Bos. & P. 132, then recently decided in the court of common pleas, in which the defendant had been arrested on the fifth day of August, and had put in and perfected bail above, and a plea had been demanded, and on the 18th of November a rule was obtained to show cause why an *exoneretur* should not be entered on the bail piece, and a common appearance allowed on the ground of an omission in the affidavit to hold to bail in not denying an offer to pay in notes of the bank. On showing cause it was alleged that the defendant had waived any irregularity in the affidavit, first, by putting in bail above; and secondly, by delaying to apply to the court till the 18th of November, twelve days after the commencement of the term. It was answered on the part of ¹³⁶ the defendant that it was impossible for him to make this application till he was regularly in court, which he was not until he had put in and perfected bail. Mr. Justice Heath and Mr. Justice Rooke, who were the only judges in court when cause was showed against the rule, held that the defendant had waived the irregularity, and discharged the rule. On the next day Lord Chief Justice Eyre said: "My brothers have mentioned to me a rule for entering an *exoneretur* on the bail piece, and allowing a common appearance which was yesterday discharged, and I think properly discharged. The defendant is not now in custody; he has put in bail, and is therefore too late to make this application. If he were to be allowed to move now I do not see why he might not be set at liberty to move after proceedings commenced against the bail. Perhaps the plaintiff has proceeded against them, and is very near judgment; for any thing I know he may have got judgment. Where, then, is the court to stop? Here the process is bad; the party does come in the first instance, but does a voluntary act by perfecting special bail; the cause goes on, with a total disregard to what is passed, the bail to the sheriff we discharged, and the whole

of that proceeding is gone. Shall the defendant now be allowed to apply to us to discharge the special bail, and introduce common bail in their place? I think he should not be heard." Lord Kenyon, C. J., then proceeds as follows: "In the case of *Jones v. Price*, 1 East, 81, Michaelmas term, 41 Geo. 3, in this court, the defendant had voluntarily put in special bail at the return of the writ, justified the bail, although not excepted to, and drawn up the rule for the allowance, and served on the plaintiff, and within a week after he obtained a rule to show cause why an *exoneretur* should not be entered on the bail piece on an objection to the affidavit to hold to bail, that it did not negative a tender of the debt in bank notes. It was answered on the part of the plaintiff that the defendant had waived any informality in the process by the above steps which he had taken. To which it was replied for the defendant that this was an application on the part of the bail, who were obliged to justify before they could be ¹²⁷ heard, and they had taken the objection in a reasonable time afterward. But the court said that this was a clear waiver of the objection; that application should have been in the first instance before the bail had justified; instead of which the defendant had lain by, and suffered the plaintiff to incur additional expense upon the supposition that all the proceedings were right, and then came to complain. But he had adopted the process, and should not then take advantage of any defect in it. These several authorities show that in this court, as well as in the court of common pleas, the affidavit to hold to bail is to be considered as part of the process to bring the defendant into court; that an irregularity in it must be taken advantage of in the first instance, and may be done before bail put in or appearance entered; that such irregularity may be waived by a defendant; and is considered as having been waived when a defendant has voluntarily done an act submitting to such process, instead of taking steps to avail himself of such irregularity, which ought always to be done in the first instance. Here the defendant put in bail on the 27th of January, four days after the commencement of the term, during which time he ought to have taken the objection to the regularity of the affidavit under which he has been holden to bail. We are therefore of opinion that he has waived this objection. The consequence is that this rule must be discharged."

This well-considered case of *D'Argent v. Vivant*, 1 East,

330, settled, and ought to have settled, the principle of law and practice in such cases in the courts of England, that an affidavit prescribed by act to hold a defendant to bail in a civil action is a part of the process to bring him into court, and any objection to it on the ground of defect, deficiency, or irregularity in it may be, and must be, taken advantage of by the defendant in the first instance, and before he has given bail or entered appearance; and, if he fails to do so, he must be considered to have waived his objection to it, and neither he nor his bail can afterward avail himself of the objection. And at a much later day in England the same principle has been ¹²⁸ ruled in the court of king's bench, that bail sued on the bail bond cannot traverse the arrest. And Park, J., said the question whether or not this security was valid when given is not touched by the matter subsequent, although that might have been a ground for moving to set the bond aside. The allegation of an arrest was not traversable by the bail: *Taylor v. Clow*, 1 Barn. & Adol. 223; 20 Eng. Com. L. 378.

And the cases to which we have been referred in the New York reports from the year 1819 down to the year 1870 show that the same rule of practice has been recognized and established to its fullest extent in that state: *Bronson v. Earl*, 17 Johns. 63; *Gregory v. Levy*, 12 Barb. 610; 7 How. Pr. 37; *Kelly v. McCormick*, 28 N. Y. 318; *Bensel v. Lynch*, 44 N. Y. 162. And it has long been the rule of practice in the courts of this state in such cases; but it has been modified or abolished in several of the other states by statutory or constitutional provisions, or a different rule of practice which has been established in them.

BAIL IN CIVIL ACTIONS—AFFIDAVIT.—A recognizance entered into upon behalf of a poor debtor cannot be avoided by showing that the affidavit upon which his arrest was ordered was willfully false when made, if it appears that the affidavit was proper in form and substance, and that the magistrate had jurisdiction to act upon it, and that he judicially found the facts to be true, and signed a certificate authorizing the arrest: *Everett v. Henderson*, 146 Mass. 89; 4 Am. St. Rep. 284.

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

JOHNSON v. DREW.

[34 FLORIDA, 130.]

EJECTMENT—EQUITABLE DEFENSE.—A plea on equitable grounds may be interposed in an action of ejectment, provided the matter set up authorizes the defendant to enjoin the judgment, should one be recovered against him. The facts alleged in such plea must not, however, make such a defense as is available in the common-law action, or the court is justified in refusing to allow the plea to be filed, or in striking it out if filed.

PATENTS—VALIDITY—PRESUMPTION.—A patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, is *prima facie* valid in an action at law.

PATENTS—VALIDITY—ATTACK UPON.—Patents to land purporting to have been issued under authority of the general government, but shown to have been issued without authority of law, as when the land undertaken to be conveyed has never been subject to the control and disposition of the government, or, if so, was withdrawn from sale when the patent issued, or in fact never belonged to the government, are void, and their invalidity may be shown as a defense in an action at law for the possession of the land.

PATENTS—VALIDITY—COLLATERAL ATTACK.—The action of the general land-office in issuing a patent for any of the public land subject to sale is conclusive at law of the legal title, until set aside by proper direct proceedings, and cannot be collaterally attacked. Such patent is also conclusive in equity until set aside in a proper proceeding on the ground that the land officers have misconstrued the law, or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights.

PATENTS—VALIDITY—EJECTMENT.—A patent to land not under the control of, nor subject to disposition by, the general-land office is void. Its invalidity may be shown in an action of ejectment to recover the land. In such case a plea setting up equitable grounds of defense cannot be filed.

PATENT AS EVIDENCE.—In an action of ejectment based upon a government patent to land regular upon its face, the patent is at least *prima facie* evidence of a good conveyance, and, in the absence of any thing to impeach it, should be admitted in evidence.

PATENTS—MERE OCCUPANT OF LAND CANNOT QUESTION.—A mere occupier of public land without any paper title, or any right of entry, or any authority of law, is a trespasser, and has no right to question the legality of a patent to the land issued by the general land-office.

PATENTS—ATTACK UPON VALIDITY OF.—A patent to public land issued by the general land-office, and not void upon its face, cannot be questioned, either directly or collaterally, by persons who do not show themselves to be in privity with a common or paramount source of title.

DEEDS—RECORD AS EVIDENCE OF EXISTENCE OF.—An original record of a deed is not admissible in evidence to show the existence and execution of the original deed when it is not shown that such original is not within the custody or control of the party offering such record copy.

L. Finley and S. Y. Finley, for the appellant.

Sparkman & Sparkman, for the appellee.

122 **MABRY J.** Appellee brought ejectment against appellant to recover possession of lot eight (8) of section nineteen, township twenty-nine south, of range nineteen east, and lot seven (7) of section twenty-four in township twenty-nine south, of range eighteen east, containing in all forty and nineteen one hundredths acres, and obtained judgment.

The defendant below filed the plea of not guilty, and a plea on equitable grounds. A demurrer was sustained to the latter plea, and an amended plea on same ground was offered to be filed, but was refused by the court for the reason assigned, that it presented no equitable defense. A consideration of the merits of the amended plea will suffice to dispose of the errors assigned in the rulings of the court in reference to the equitable pleas.

The amended plea offered to be filed alleges in substance that the land sued for was situated within the Fort Brooke Military Reservation of the United States, at Tampa, Florida, and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry on the land made in the United States land-office at Gainesville, Florida, by Louis J. Brush, plaintiff's grantor, with Valentine scrip; that at the time of the said location and entry of said land, and at the time of the issuance of the patent to Brush, the defendant was in actual occupancy and possession of said land, and was residing upon it with his family as a home; that defendant had settled upon and was in the

actual possession of said land, it being a portion of said Fort Brooke Military ¹³³ Reservation, prior to the location of said reservation in the year 1877, and prior to the location of said reservation upon said reservation in the year 1878, and had settled thereon prior to January 1, 1884, in good faith for the purpose of securing a home, and of entering the same under the general laws of the United States, and continued in such occupancy from a period prior to the first day of January, 1884, to the time of the approval of the act of Congress of July 5, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereof. That at the time of the said pretended location and entry of said land with Valentine scrip by plaintiff's grantor and the issuance of said patent to him, said land was occupied by defendant as aforesaid, and was appropriated, and was not then, and is not now, unoccupied and unappropriated public land of the United States, as required, specified, and limited by the act of Congress in such case made and provided in authorizing the location of said scrip; that at the time of the said pretended entry of said land and the issuance of said patent to plaintiff's grantor said land had not been surveyed under the direction and control of the general land-office of the United States, and that said entry was made upon tracts less than the subdivisions provided for in the United States land laws, and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip and the issuance of the said patent to the plaintiff's grantor said land was within the jurisdiction of the war department of the United States, and not within the land department. And defendant alleges that said patent ¹³⁴ is in fraud and violation of the acts of the Congress of the United States and of the rights of the war department; and that said patent is void, and vests no legal or equitable title, nor right of possession, in and to said land in plaintiff; and that defendant by virtue of said acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of the said land mentioned in plaintiff's declaration.

It will be seen by reading the foregoing plea that while the issuance of a patent on a location and entry of the land with Valentine scrip is admitted one purpose is to impeach the patent on the ground that the land was reserved, and not

subject at the time to be entered by such scrip. Before examining the allegations of this plea reference will be made to the acts of Congress on the subject, and also to some decisions bearing on the character of the defense sought to be made by the plea.

In April, 1872, Congress passed an act authorizing the ninth circuit court of the United States, for California, to hear and decide upon the merits of the claim of Thomas B. Valentine, under a Mexican grant to Juan Miranda, to a place called the Rancho Arroyo de San Antonio, situated in Sonoma county, state of California, with right of appeal to the supreme court of the United States. It was also provided in said act that any decree that might be obtained in favor of said claim should not affect any adverse right or title to the lands described in the decree, but in lieu thereof the claimant, or his legal representatives, might select and should be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States ¹⁸⁵ land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys; and the commissioners of the general land-office, under the direction of the secretary of the interior, was authorized to issue scrip, in legal subdivisions, to Valentine, or his legal representatives, in accordance with the provisions of the act, provided that no decree in favor of Valentine should be executed, or be of any force or effect against any person or persons, nor should any land scrip or patents be issued as therein provided, unless Valentine should first execute and deliver to the commissioner of the general land-office a deed conveying to the United States all his right, title, and interest to the land covered by the said Miranda grant. The scrip located upon the land in question, and for which the patent issued, was the Valentine scrip authorized to be issued by the act above mentioned.

In August, 1856, provision was made by an act of Congress as follows: "That all public lands heretofore reserved for military purposes in the state of Florida, which said lands, in the opinion of the secretary of war, are no longer useful or desired for such purposes, or so much thereof as said secretary may designate, shall be, and are hereby, placed under the control of the general land officer, to be disposed of and

sold in the same manner and under the same regulations as other public lands of the United States; *provided*, that said lands shall not be so placed under the control of said general land-office until said opinion of the secretary of war, giving his consent, communicated to the secretary of the interior in writing, shall be filed and recorded": Act of August 18, 1856, c. 129. This act was repealed in 1884, and provision made by the repealing act that whenever, in ¹³⁶ the opinion of the President of the United States, the lands, or any portion of them included within the limits of any military reservation theretofore or thereafter declared, have become or shall become, useless for military purposes, he shall cause the same, or so much thereof as he may designate, to be placed under the control of the secretary of the interior for disposition as provided in the act, and shall cause to be filed with the secretary of the interior notice thereof. Provision was also made for the secretary of the interior to have the said lands or any part of them surveyed, or subdivided into tracts of less than forty acres, and into town lots, or either or both, and also for an appraisement and public sale of said lands, and, after offering them at public sales, to allow the remaining lands to be taken by private entry on conditions prescribed. This act contains the following provisos: "*Provided*, that any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January 1, 1884, in good faith for the purpose of securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions; *provided, further*, that said lands were subject to entry under the public land laws at the time of their withdrawal": Acts of 1884, c. 214.

The right to interpose a plea on equitable grounds in an action of ejectment is clear, provided the matter set up in such plea will authorize the defendant to enjoin in a court of equity the judgment, should one be recovered ¹³⁷ against him. The facts alleged in such plea must not, however, make such a defense as is available to the defendant in the common-law action, as the court in such case will be justified in refusing to allow the plea to be filed, or in striking it out if filed: *Dickson v. Gamble*, 16 Fla. 687; *Spratt v. Price*, 18 Fla. 289;

Walls v. Endel, 20 Fla. 86; *Johnston v. Allen*, 22 Fla. 224; 1 Am. St. Rep. 180. Does the plea set up any defense, and if so, is it available to the defendant under the general issue in an action of ejectment? A patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, must at least be regarded as *prima facie* valid in actions at law. Whether such a patent can be impeached in a proceeding at law, as distinguished from a suit in equity, and, if so, under what conditions it can be done, has given rise to considerable judicial discussion in the courts of this country. The case of *Polk v. Wendal*, 9 Cranch, 87, if not the first, is the leading case on the subject in the supreme court in the United States. Without going into a discussion of the various cases on the subject since that time, it may be stated that when patents purporting to have been issued under authority of the United States government are shown to have been issued without authority of law, as in cases where the land undertaken to be conveyed had never been subject to its control and disposition, or if so, had been withdrawn from sale when the patent issued, or had, in fact, never belonged to the government, such patents are void, because the officers issuing them had no authority at all to make the grant. In such cases the patents are absolutely void, and their invalidity may be shown as a defense in an action at law for the possession of the land: *Doolan* ¹²⁸ v. *Carr*, 125 U. S. 618, and authorities cited; *Knight v. United States Land Assn.*, 142 U. S. 161; *Foss v. Hinkell*, 78 Cal. 158; *Wilcox v. Jackson*, 13 Pet. 498. If the patent is not absolutely void, but voidable, then, it seems, direct proceedings will be required in a proper case, and on proper proceedings to have the patent declared void. In *Johnson v. Towsley*, 13 Wall. 72, a bill in chancery to cancel a patent where two had been issued for the same land, the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others until reversed in a direct proceeding, was referred to, and it was said "that the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial

proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." It was also said in the same case: "On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, ¹³⁹ or other relief granted. No reason is perceived why the action of the land-office should constitute an exception to this principle." In *Steel v. Smelting Co.*, 106 U. S. 447, it is said, after referring to several cases discussing the legal effect of a patent regularly issued, that "it need hardly be said that we are here speaking of a patent issued in a case where the land department had jurisdiction to act, the lands forming part of the public domain, and the law having provided for their sale. If they never were the property of the United States, or if no legislation authorizing their sale, or if they had been previously disposed of or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale." The case of *Porter v. Bishop*, 25 Fla. 749, holds that in entries under the United States homestead laws where only questions of fact, or mixed questions of law and facts, are involved, the decision of the secretary of the interior thereon is final, but that where, by misconstruing the law, the officers of the land department have withheld from a party his just rights, or where misrepresentation and fraud have been practiced, necessarily affecting their judgment, the courts may, in a proper proceeding, interfere and refuse to give effect to their action.

The action of the land-office in disposing of land subject to sale under any law regulating the disposition of the public domain is conclusive of the legal title, so far as an inquiry

into all matters connected ¹⁴⁰ with the issuance of the patent extends, and such patent is also conclusive in equity until set aside in a proper proceeding, on the ground that the land officers have misconstrued the law, or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights.

The supreme court of the United States clearly holds, as we understand it, that, if the land patented was not under the control and subject to disposition of the land-office, the patent is void, and its invalidity may be shown in an action of ejectment to recover the land by virtue of the patent. The act of Congress of 1872, authorizing the issuance of the Valentine scrip, provides that patents may issue for it for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, whether surveyed or not, in tracts not less than the subdivisions provided for in the United States land laws, and, if unsurveyed when taken, to conform when surveyed to the general system of the United States land surveys. The plea alleges that the land sued for and entered with Valentine scrip was situated within Fort Brooke Military Reservation, at Tampa, and at the time of said entry and the issuance of said patent to plaintiff's grantor the land was within the jurisdiction of the war department of the United States, and not within the land department. It is also alleged that the patent was in fraud and violation of the acts of Congress and of the rights of the war department, and was void; but this allegation of fraud must be taken as referring to the issuance of the patent when the land was within the jurisdiction of the war department, and not subject to the control of the land-office department. As an independent allegation of fraud it would be nothing but a legal conclusion of ¹⁴¹ the pleader. There is also an allegation that when the entry was made and the patent issued, defendant was in possession of the land, and that it was not then, or at the time of filing the plea, unoccupied and unappropriated public land, as specified by the act of Congress authorizing the location of land with Valentine scrip. The allegation that the land was not unoccupied public land is based upon the alleged fact that defendant was in possession, but the further allegations that the land was situated within Fort Brooke Military Reservation, and, at the time of the entry and issuance of the patent, was within the jurisdiction of the war department, and not within

the land department, are sufficient, in our opinion, to show, if true, that the land officers had no authority to permit the land to be entered with the Valentine scrip. The act of Congress in force up to July 5, 1884, authorized a transfer of the land by the secretary of war to the land department under certain conditions, and the patent alone would afford *prima facie* evidence that the proper transfer had been made before the issuance of the patent. The allegations of the plea, if true, negative such fact, and show that the land was still under the control of the war department when the patent was issued. Under such circumstances the land officers had no authority to issue the patent, and, under the rule above announced, it would be void and subject to attack in an action at law. The allegation that when the patent issued the land had not been surveyed and the entry was made upon tracts less than the subdivisions provided for in the United States land laws does not aid the plea. The scrip referred to was authorized to be located upon any unoccupied and unappropriated public land, not mineral, whether surveyed or not; but the survey, when made, is required to conform to the general system ¹⁴² of United States land surveys. If the land was not under the control of the interior department, as alleged, the land officers had no authority over it, and their action in undertaking to dispose of the land was void. If it were shown that the land-office had authority to dispose of the land a question would arise as to whether or not the matter of surveys belongs exclusively to that department: *Craign v. Powell*, 128 U. S. 691; *Knight v. United States Land Assn.*, 142 U. S. 161. Conceding that the defendant was in a condition to attack the patent, all the available defense sought to be set up by the equitable plea could, in our judgment, be relied upon as a legal defense under the general issue, and the courts did not err in refusing to allow such pleas to be filed.

So far we have considered the plea on the theory that the defendant was shown to be in a situation to attack the patent on the ground that it was void. He bases his right to the land on a settlement and occupancy of the land under the act of Congress of July 5, 1884, and his right to make a homestead entry, and it will be observed that the rights given to the settler in the first proviso in this act are coupled with a further proviso that the land was subject to entry under the public land laws at the time of their withdrawal. The

actual occupancy of the land by the defendant is alleged, as well as his right to make a homestead entry and to enter the land, but there is no distinct allegation that the land was subject to entry under the public land laws at the time of its withdrawal.

The question of defendant's right to attack the patent is involved in the further questions presented on the ¹⁴³ trial under the general issue, and we will consider it in connection with them.

On the trial a patent for the land described in the declaration to Louis J. Brush, bearing date September 13, 1882, was offered in evidence by the plaintiff, and objected to by the defendant, but the objection was overruled and the patent admitted in evidence. There was no error in admitting the patent. It recited that it was issued upon a location of the land in the district of lands subject to sale at Gainesville, Florida, with scrip issued by virtue of the act of Congress in 1872, in favor of Thomas B. Valentine, and was in due form. The patent was at least *prima facie* evidence of a good conveyance of the land, and, in the absence of any thing to impeach it, should have been admitted in evidence. A deed from Brush and wife conveying the land to plaintiff was then introduced without objection.

Defendant offered as documentary evidence certified copies of what purports to be official communications between the secretary of war and the secretary of the interior, commencing in 1860 in reference to Fort Brooke reservation, at Tampa, and also the approvals of the President of the United States in 1877 and 1878 of the request of the secretary of war in reference to said reservation. The purpose for introducing this evidence was to show that the land described in the patent was a part of the military reservation of Fort Brooke, at Tampa, when the patent was issued. On objection of plaintiff the documentary evidence was excluded and defendant excepted. Defendant then testified that he was a native born citizen of the United States, and the head of a family, and offered to show that he settled upon the land in question prior to the issuance of the patent, and was actually occupying ¹⁴⁴ said land on the first day of January, 1884, and continued to occupy it up to the date of the act mentioned, and that his settlement and occupancy of the land was for the purpose of entering it under the homestead laws of the United States. The record shows that some evidence

offered by defendant to show his occupancy of the land was admitted, but it also shows that the court excluded most of the testimony offered by defendant on this point. There was no effort to show that defendant had ever obtained any certificate of entry of the land from the land-office, or that he had any deed or paper evidence of title of any kind to the land from any source whatever. Testimony was offered tending to show that in July, 1883, defendant made some efforts to make an application at the local land-office for the land, and also consulted a party as to how he should proceed to make the application, and did in fact make an affidavit, that he was residing upon Fort Brooke reservation, before a judge, and forwarded it to Washington. The circuit judge refused to admit testimony offered by defendant to show occupancy of the land either before or subsequent to January 1, 1884, for the purpose of entering it under the homestead laws, or otherwise, and the rulings of the court rejecting such evidence were excepted to by the defendant. This testimony offered by the defendant and ruled out by the court was objected to, among other grounds, because the defendant had not shown that he was in a situation to attack the patent offered in evidence by the plaintiff. Without considering the other grounds of objection to the testimony, or the views of the circuit court in passing thereon, we think the objection mentioned was good, and it is decisive of the entire defense sought to be interposed by the defendant. There is doubt whether the documentary ¹⁴⁵ evidence offered by the defendant shows that the particular lots of land described in the declaration were embraced in Fort Brooke reservation when the patent was issued, but, without going into either the competency or relevancy of this evidence, we do not see how the defendant can call in question the validity of the patent on the showing he made.

The rights given to the settler of any part of a military reservation by the act of July 5, 1884, were upon the condition that said land was subject to entry under the public land laws at the time of their withdrawal. There was no showing made or offered to be made that the Fort Brooke reservation at Tampa was ever subject to entry under any of the public land laws when it was withdrawn for a reservation. If it had never been subject to such entry the defendant could acquire no rights, by virtue of the act mentioned, to enter the land under the general laws, as Congress had not

secured to him such right by said act in providing for the disposition and sale of military reservations. At most he was an occupier of lands of the United States without any right of entry, and without any authority of law. We have been unable to find any authority to sanction the view that a mere trespasser upon public land has the right to question the legality of a patent issued by the United States land officers. The case would be entirely different if a settlement should be made upon public land subject to entry under the provisions of law, and we find cases holding that inchoate rights acquired under such an entry will be protected even against a patent issued in violation of such a settler's rights. In the case of *Doolan v. Carr*, 125 U. S. 618, which was an action of ejectment, and in which the right to attack a patent issued ¹⁴⁶ for the land in question was recognized, it appears that the defendants had entered upon the land under a claim of pre-emption settlement, and had made and subscribed declaratory statements of intention to pre-empt the land, and presented them to the register of the proper land-office, but they were refused on the ground that the land had been patented to a railroad company. The land was not subject to disposition by the land-office when the patent was issued, being then embraced in a Mexican grant, but had been transferred to the interior department, and was subject to entry when the pre-emption claim was made: *Winona etc. Land Co. v. Ebilcisor*, 52 Minn. 312. In the case before us there was no showing that the land occupied by the defendant was ever subject to entry under any of the public land-laws by homestead entry, or that the defendant had acquired any right, inchoate or otherwise, to enter the land. The defendant's claim is not shown to have been in privity with the government's title in any way, and his adverse holding, under the showing made, places him in the attitude of a mere trespasser upon the land. As such we do not think he can be heard to question the legality of the patent issued by the land-office. The case of *Reynolds v. Iron Silver Min. Co.*, 116 U. S. 687, involving the validity of a patent under a placer mine claim, decides that as the title in the veins of mineral lands known to exist, and not claimed or referred to in the patent, remains in the United States, the patentee had no right to dispossess one in peaceable possession of such veins, whether the latter have any title or not. An examination of the case will show that it did not involve

CASES
IN THE
SUPREME COURT
OF
FLORIDA.

JOHNSON v. DREW.

[34 FLORIDA, 130.]

EJECTMENT—EQUITABLE DEFENSE.—A plea on equitable grounds may be interposed in an action of ejectment, provided the matter set up authorizes the defendant to enjoin the judgment, should one be recovered against him. The facts alleged in such plea must not, however, make such a defense as is available in the common-law action, or the court is justified in refusing to allow the plea to be filed, or in striking it out if filed.

PATENTS—VALIDITY—PRESUMPTION.—A patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, is *prima facie* valid in an action at law.

PATENTS—VALIDITY—ATTACK UPON.—Patents to land purporting to have been issued under authority of the general government, but shown to have been issued without authority of law, as when the land undertaken to be conveyed has never been subject to the control and disposition of the government, or, if so, was withdrawn from sale when the patent issued, or in fact never belonged to the government, are void, and their invalidity may be shown as a defense in an action at law for the possession of the land.

PATENTS—VALIDITY—COLLATERAL ATTACK.—The action of the general land-office in issuing a patent for any of the public land subject to sale is conclusive at law of the legal title, until set aside by proper direct proceedings, and cannot be collaterally attacked. Such patent is also conclusive in equity until set aside in a proper proceeding on the ground that the land officers have misconstrued the law, or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights.

PATENTS—VALIDITY—EJECTMENT.—A patent to land not under the control of, nor subject to disposition by, the general-land office is void. Its invalidity may be shown in an action of ejectment to recover the land. In such case a plea setting up equitable grounds of defense cannot be filed.

PATENT AS EVIDENCE.—In an action of ejectment based upon a government patent to land regular upon its face, the patent is at least *prima facie* evidence of a good conveyance, and, in the absence of any thing to impeach it, should be admitted in evidence.

PATENTS—MERE OCCUPANT OF LAND CANNOT QUESTION.—A mere occupier of public land without any paper title, or any right of entry, or any authority of law, is a trespasser, and has no right to question the legality of a patent to the land issued by the general land-office.

PATENTS—ATTACK UPON VALIDITY OF.—A patent to public land issued by the general land-office, and not void upon its face, cannot be questioned, either directly or collaterally, by persons who do not show themselves to be in privity with a common or paramount source of title.

DEEDS—RECORD AS EVIDENCE OF EXISTENCE OF.—An original record of a deed is not admissible in evidence to show the existence and execution of the original deed when it is not shown that such original is not within the custody or control of the party offering such record copy.

L. Finley and S. Y. Finley, for the appellant.

Sparkman & Sparkman, for the appellee.

122 MABRY J. Appellee brought ejectment against appellant to recover possession of lot eight (8) of section nineteen, township twenty-nine south, of range nineteen east, and lot seven (7) of section twenty-four in township twenty-nine south, of range eighteen east, containing in all forty and nineteen one hundredths acres, and obtained judgment.

The defendant below filed the plea of not guilty, and a plea on equitable grounds. A demurrer was sustained to the latter plea, and an amended plea on same ground was offered to be filed, but was refused by the court for the reason assigned, that it presented no equitable defense. A consideration of the merits of the amended plea will suffice to dispose of the errors assigned in the rulings of the court in reference to the equitable pleas.

The amended plea offered to be filed alleges in substance that the land sued for was situated within the Fort Brooke Military Reservation of the United States, at Tampa, Florida, and that the plaintiff claimed title to the same by virtue of a patent predicated upon a pretended location and entry on the land made in the United States land-office at Gainesville, Florida, by Louis J. Brush, plaintiff's grantor, with Valentine scrip; that at the time of the said location and entry of said land, and at the time of the issuance of the patent to Brush, the defendant was in actual occupancy and possession of said land, and was residing upon it with his family as a home; that defendant had settled upon and was in the

actual possession of said land, it being a portion of said Fort Brooke Military ¹³³ Reservation, prior to the location of said reservation in the year 1877, and prior to the location of said reservation upon said reservation in the year 1878, and had settled thereon prior to January 1, 1884, in good faith for the purpose of securing a home, and of entering the same under the general laws of the United States, and continued in such occupancy from a period prior to the first day of January, 1884, to the time of the approval of the act of Congress of July 5, 1884, and is by law entitled to make a homestead entry, and to enter said land, and in equity and good conscience is entitled to the exclusive right of possession thereof. That at the time of the said pretended location and entry of said land with Valentine scrip by plaintiff's grantor and the issuance of said patent to him, said land was occupied by defendant as aforesaid, and was appropriated, and was not then, and is not now, unoccupied and unappropriated public land of the United States, as required, specified, and limited by the act of Congress in such case made and provided in authorizing the location of said scrip; that at the time of the said pretended entry of said land and the issuance of said patent to plaintiff's grantor said land had not been surveyed under the direction and control of the general land-office of the United States, and that said entry was made upon tracts less than the subdivisions provided for in the United States land laws, and did not conform to the general system of the United States land survey; that at the time of the entry of said land with Valentine scrip and the issuance of the said patent to the plaintiff's grantor said land was within the jurisdiction of the war department of the United States, and not within the land department. And defendant alleges that said patent ¹³⁴ is in fraud and violation of the acts of the Congress of the United States and of the rights of the war department; and that said patent is void, and vests no legal or equitable title, nor right of possession, in and to said land in plaintiff; and that defendant by virtue of said acts of Congress, and in equity and good conscience, is entitled to the exclusive possession of the said land mentioned in plaintiff's declaration.

It will be seen by reading the foregoing plea that while the issuance of a patent on a location and entry of the land with Valentine scrip is admitted one purpose is to impeach the patent on the ground that the land was reserved, and not

subject at the time to be entered by such scrip. Before examining the allegations of this plea reference will be made to the acts of Congress on the subject, and also to some decisions bearing on the character of the defense sought to be made by the plea.

In April, 1872, Congress passed an act authorizing the ninth circuit court of the United States, for California, to hear and decide upon the merits of the claim of Thomas B. Valentine, under a Mexican grant to Juan Miranda, to a place called the Rancho Arroyo de San Antonio, situated in Sonoma county, state of California, with right of appeal to the supreme court of the United States. It was also provided in said act that any decree that might be obtained in favor of said claim should not affect any adverse right or title to the lands described in the decree, but in lieu thereof the claimant, or his legal representatives, might select and should be allowed patents for an equal quantity of the unoccupied and unappropriated public lands of the United States, not mineral, and in tracts not less than the subdivisions provided for in the United States ¹⁸⁵ land laws, and, if unsurveyed when taken, to conform, when surveyed, to the general system of the United States land surveys; and the commissioners of the general land-office, under the direction of the secretary of the interior, was authorized to issue scrip, in legal subdivisions, to Valentine, or his legal representatives, in accordance with the provisions of the act, provided that no decree in favor of Valentine should be executed, or be of any force or effect against any person or persons, nor should any land scrip or patents be issued as therein provided, unless Valentine should first execute and deliver to the commissioner of the general land-office a deed conveying to the United States all his right, title, and interest to the land covered by the said Miranda grant. The scrip located upon the land in question, and for which the patent issued, was the Valentine scrip authorized to be issued by the act above mentioned.

In August, 1856, provision was made by an act of Congress as follows: "That all public lands heretofore reserved for military purposes in the state of Florida, which said lands, in the opinion of the secretary of war, are no longer useful or desired for such purposes, or so much thereof as said secretary may designate, shall be, and are hereby, placed under the control of the general land officer, to be disposed of and

court excluded the testimony. In so doing it clearly acted upon the presumption that a wife in a criminal case cannot testify for or against her husband. According to a recent decision of this court—*Everett v. State*, 33 Fla. 661—this was error, and she should have been permitted to testify. The occurrence about which the witness was called upon to testify was also so short a time before the killing occurred as to be practically the beginning of the same difficulty. ¹⁷⁰ Therefore it was part of the *res gestæ*. It was error as to both of the defendants to exclude this testimony.

The fourth assignment of error is based upon the refusal of the court below to grant a new trial. The first two grounds were: 1. That the verdict was contrary to law; and 2. Contrary to the evidence; and 3. The refusal of the court to permit the wife of one of the defendants, Kenneth Walker, to testify in his behalf. No particular reason is assigned why the verdict was contrary to law. As the case must be remanded for a new trial in the circuit court it is not proper or necessary that we consider the sufficiency of the evidence to support the verdict rendered.

The fifth error assigned is, that the court erred in overruling defendants' motion in arrest of judgment. This motion was upon grounds as follows: 1. The indictment does not state in what part of the body of the deceased, Wiley Bentley, Sr., the mortal wound was inflicted; 2. The indictment does not state the dimensions of the wound which it is stated caused the death of Wiley Bentley, Sr. As it can be more easily disposed of we will consider the last ground first. This court has decided, overruling the case of *Keech v. State*, 15 Fla. 591, that in a murder case it is not necessary to state in the indictment the dimensions of the incised wound which caused the death: *Hodge v. State*, 26 Fla. 11. The indictment in this case clearly states the dimensions of the wound, of the breadth of one inch and depth of four inches. The motion in this respect is not true in point of fact.

We next consider the ground that the indictment does not show upon what part of the body of the deceased the mortal wound was inflicted. Judge Randall ¹⁷¹ says in the same case of *Keech v. State*, 15 Fla. 608, in an uncertain way: "It is also insisted that the indictment is defective, in that it does not show upon what part of the body of the deceased the wound was inflicted. We believe it is uniformly held in the English books that the part of the body

in which the deceased was wounded should be particularly stated." The language of the indictment is not quoted in the opinion in the Keech case. We have inspected it in the transcript of the record of the case among the files of the court. The indictment in that case, in the portion of it stating the wounding of the deceased, said that the defendant "with a certain pistol, loaded, etc., shot off and discharged, etc., did strike, penetrate, and wound the said Ellen Wells." The indictment in the present case is much better. It alleges that the defendant "with a certain knife, etc., the said Wiley Bentley did strike and thrust, giving to the said Wiley Bentley then and there, with the knife aforesaid, in and upon the body of him, the said Wiley Bentley, one mortal wound," and gives the dimensions of the wound. We think the indictment is sufficient. True, there are some old English decisions, and some more modern American authorities, following the course of the common law, which hold that the part of the body upon which the wound is inflicted should be described with great particularity: *Vide* 3 Chitty's Criminal Law, 735; 1 Archbold's Criminal Practice, 790, 791; *Dias v. State*, 7 Blackf. 20; 39 Am. Dec. 448. But this strictness has been considerably relaxed even in England: *Rex v. Mosley*, 1 Moody C. C. 97; 2 Brit. C. C. *Turner's case*, 1 Lew. C. C. 177; 2 Bishop's Criminal Procedure, sec. 518, and authorities cited. Our statute provides: "Every indictment shall be deemed and adjudged good which charges the crime substantially ¹⁷² in the language of the statute, . . . or, if at common law, so plainly that the nature of the offense charged may be easily understood by the jury": Rev. Stats., sec. 2892. And further, "no indictment shall be quashed or new trial granted on account of any defect in the form of the indictment, or of misjoinder of offenses, or for any cause whatsoever, unless the court shall be of the opinion that the indictment is so vague, indistinct, and indefinite as to mislead the accused, or embarrass him in the preparation of his defense, or expose him after acquittal or conviction to substantial danger of a new prosecution for the same offense: Rev. Stats., sec. 2893. We do not think this indictment objectionable within the purview of the statute, whatever might be said of it under a strict common-law construction. It never was required that the proof should show with any strictness that the wound was upon the same part of the body that the indictment alleged it to be. Bishop's Criminal Procedure, section 526, in treating

upon this point, says: "In principle, as this allegation is not required to be proven so that it gives the defendant no information of practical value, it need not be made"; and further, in the same section, says: "If it is to be observed at all, it is upon the mere ground of authority."

In our opinion the great weight of American and more recent authority is that it is not necessary, in an indictment for homicide, to state upon what particular part of the body the mortal wound was inflicted: *People v. Steventon*, 9 Cal. 273; *Moore v. State*, 15 Tex. App. 1; *Sanchez v. People*, 22 N. Y. 147; *Cordell v. State*, 22 Ind. 1; *Whelchell v. State*, 23 Ind. 89; *Jones v. State*, 35 Ind. 122; Maxwell's Criminal Procedure, 182. We think it sufficient to allege that the mortal wound was inflicted upon the body of ¹⁷⁸ the deceased. The word "body," as applied to the human frame, in ordinary language, has a well-defined and well-understood signification. It means the trunk, as distinguished from the head and limbs, that part of a human being between the upper part of his thighs or hips and his neck, excluding his arms. The case of *Sanchez v. People*, 22 N. Y. 147, is a case very similar to the one at bar. In that case the court said: "The indictment charges the commission of the murder in the following words: 'And that the said Felix Sanchez, with a certain sword, which he, the said Felix Sanchez, in his right hand then and there had and held, the said Harmon Curnon, in and upon the body of him, the said Harmon Curnon, then and there willfully and feloniously, and of his malice aforethought, did stab, cut, and wound, giving unto the said Harmon Curnon then and there with the sword aforesaid, in and upon the body of him, the said Harmon Curnon, one mortal wound, of the breadth of one inch, and of the depth of three inches, of which said mortal wound he, the said Harmon Curnon, at the ward, city, and county aforesaid, then and there instantly died.' The indictment does not otherwise show upon what part of the body of Curnon the mortal wound was given; and the counsel for the plaintiff in error now contends that the omission is fatal. The indictment, in my opinion, is sufficiently certain in this respect. By the word, "body," in this connection, is to be understood the trunk of the man, in distinction from his head and limbs. This is the doctrine of the books on the subject: *Long's case*, Coke, pt. 5, 120. It is usual to state the particular part of the body upon which the violence produ-

ing the death was inflicted; and in some of the old authorities it is said that the charge or statement of the crime in the indictment ¹⁷⁴ should be so precise in this respect, that from such statement you could lay your finger on the particular spot. But this strictness has given way to a more sensible and practical rule. The object of an indictment is to give to the party accused reasonable notice of the crime with which he is charged, in order that he may prepare his defense and be protected against a second trial for the same offense. Neither of these objects are attained or approached by requiring specifications which need not be proved; and it is well settled that an allegation that the wound was inflicted on one part of the body is sustained by evidence showing that it was on another and different part. For example, a charge that the wound was made on the right side of the body is sustained by evidence that it was on the left side: 1 Russell on Crimes, 5th Am. from 3d Lond. ed., 558-562, and authorities there cited; and the same rule applies in respect to the length and depth of the wound. But assuming the common-law rule to require the indictment to state the particular part of the body where the mortal wound was inflicted, the consideration that the public prosecutor is not obliged to prove that it was in the part of the body as charged, and that such allegation is sustained by evidence that it was inflicted elsewhere on the body, proves that it is a matter of form, so far as relates to the place upon the body where the wound was inflicted."

For the errors herein pointed out the judgment of the court below is reversed and a new trial granted.

WITNESSES—HUSBAND AND WIFE.—That a husband or wife cannot testify against each in criminal cases, see the following line of cases: *State v. Jolly*, 2 Dev. & B. 110; 32 Am. Dec. 656, and note; *Byrd v. State*, 57 Miss. 243; 34 Am. Rep. 440, and note; *Compton v. State*, 13 Tex. Ct. App. 271; 44 Am. Rep. 703. A wife is competent, however, to testify against her husband in a criminal action whenever she is the individual particularly and directly affected by the crime for which he is being prosecuted: *Dill v. People*, 19 Col. 469; 41 Am. St. Rep. 254, and note. See, also, the extended note to *State v. Boyd*, 27 Am. Dec. 377.

HOMICIDE—EVIDENCE—RES GESTÆ.—In a trial for murder where the evidence shows that the accused, after being knocked down by the deceased, armed himself, and, returning in from two to five minutes, shot and killed the deceased upon the renewal of the quarrel, the particulars of the whole transaction are admissible in evidence, as being parts of the *res gestæ*, although strictly speaking all that occurred did not form one continuous transaction: *Stitt v. State*, 91 Ala. 10; 24 Am. St. Rep. 853, and

note. See, also, *State v. Harris*, 45 La. Ann. 842; 40 Am. St. Rep. 259, and note.

HOMICIDE—INDICTMENT—STATING DIMENSIONS OF WOUND.—A description of the length or breadth of the wound is not necessary in an indictment for murder: *Dias v. State*, 7 Blackf. 20; 39 Am. Dec. 448, and note; *State v. McCoy*, 8 Rob. 545; 41 Am. Dec. 301, and note; *People v. King*, 27 Cal. 507; 87 Am. Dec. 95. *Contra*, see *State v. Owen*, 1 Murph. 452; 4 Am. Dec. 571, and note.

HOMICIDE—INDICTMENT.—An indictment for murder under the criminal code of California need not designate the part of the body upon which the mortal wound was inflicted: *People v. King*, 27 Cal. 507; 87 Am. Dec. 95, and note. The indictment should state a particular part of the body as the locality of the mortal injury, but it is not necessary that the proof should literally correspond: *State v. Jenkins*, 14 Rich. 215; 94 Am. Dec. 182.

CHABOT v. WINTER PARK COMPANY.

[34 FLORIDA, 258.]

CONTRACTS—TIME AS ESSENCE OF.—In equity time is not regarded as of the essence of a contract unless expressly stated to be so.

CONTRACTS—TIME, WHEN ESSENCE OF.—If a party to a contract for the sale of lands is guilty of laches and negligence in performing, and the time for performance has passed, the other party may, by giving notice, fix a reasonable time for the performance of the contract, and has a right to treat it as abandoned if performance is not completed in such reasonable time.

VENDOR AND PURCHASER—CONTRACT TO PURCHASE—BREACH OF—NOTICE TO PERFORM.—If a vendee in default under a contract for the sale of land receiving notice fixing a reasonable time in which to perform and complete the contract ignores the notice, and fails to ask any further extension of time or to assert any right, he must be considered as acquiescing in the demand contained in the notice, and as abandoning all rights he may have had to enforce the performance of the contract.

VENDOR AND PURCHASER—BREACH OF CONTRACT TO PURCHASE—NOTICE TO PERFORM.—In order that notice to perform given to a vendee in default in the performance of a contract to purchase land shall have the effect to put a limitation upon the time for the performance of the contract the time fixed by the notice for such performance must be a reasonable time within which to do the act required. What is such reasonable time must depend upon the facts of each particular case.

SPECIFIC PERFORMANCE—TIME AS ESSENCE OF CONTRACT.—While equity does not regard time as of the essence of a contract for the sale of land unless expressly made so by the contract, yet it requires that one who seeks specific performance of such contract shall not be guilty of unreasonable delay, and shall seek his redress with reasonable promptness.

SPECIFIC PERFORMANCE OF CONTRACTS FOR THE SALE OF LAND is not a matter of right in either party, but rests in the sound discretion of a court of equity.

SPECIFIC PERFORMANCE—TIME WITHIN WHICH TO FILE BILL.—What is a reasonable time within which to file a bill for specific performance of a contract for the sale of land cannot be fixed with precision by any general rule, but such delay as raises a presumption that the party has abandoned the contract is unreasonable, and is equivalent to consent to rescission.

SPECIFIC PERFORMANCE—COMPENSATION FOR IMPROVEMENTS.—If a vendee in possession under a contract to purchase land has made valuable improvements upon the faith of his purchase, and the contract is such that specific performance cannot be enforced, the vendor may be compelled to refund the purchase money, and pay the actual value of the improvements; in order to entitle the vendee to recover for improvements, he must be free from fault, and specific performance must fail by reason of some defect in the contract or noncompliance with the statute of frauds.

SPECIFIC PERFORMANCE—IMPROVEMENTS—COMPENSATION FOR WHEN NOT ALLOWED.—A vendee in possession under a contract for the purchase of land, suing for specific performance, who fails to maintain his right of action, not from any technical defect in the form of the contract, but on account of his own laches, negligence, and disregard of his obligations, is not entitled to recover for improvements erected by him.

SPECIFIC PERFORMANCE—ADJUSTMENT OF EQUITIES.—If specific performance is denied because of some technical defect in a contract for the sale of land the court may retain the bill and adjudicate and adjust any other equities which have arisen between the parties.

W. H. Jewell, for the appellant.

Massey & Wilcox, for the appellee.

200 LIDDON, C. J. The appellant, who was complainant below, brought his bill in equity against the appellees. The bill prayed for specific performance by the defendant, the Winter Park Company, of a contract for the sale of a lot in the town of Winter Park, and for cancellation of a deed made to the same lot by said defendant to George B. Dorn, its codefendant; and also prayed in the alternative that the defendant, the Winter Park Company, be compelled to refund to the complainant the difference between the fair value of the premises and the amount due to said company by the complainant. After demurrers to the bill of complaint were overruled the defendants answered the same. The case was set down by the complainant for hearing upon bill and answer, and was so heard, and upon such hearing the court dismissed the bill. By this course all the material averments of the answer were admitted to be true.

The facts of the case, as gathered from the bill and answer, are substantially as follows: On the twelfth day of September, A. D. 1885, the Winter Park Company agreed to sell to the

complainant, and the complainant agreed to buy, the lot in the bill of complaint mentioned. The purchase price of said lot was two hundred and fifty dollars, of which amount one hundred dollars was paid in cash, and the remainder, with interest at eight per cent per annum, was to be paid one year from the date of said sale. The complainant went into possession, but the Winter Park Company reserved the title to said lot, agreeing to execute a warranty deed to the complainant upon his compliance with the terms of sale. The record does not ²⁶¹ disclose whether this original contract was in writing or by parol, but it is stated in the brief for appellant to have been by parol. The complainant, after taking possession, made some small improvements upon the lot, not exceeding three hundred dollars in value, consisting of an inferior dwelling and a blacksmith-shop. The complainant failed to pay the balance of the purchase money on September 12, 1886, according to the terms of the agreement. In the spring of 1887, when the complainant was about to remove to the state of Massachusetts, a new agreement was made by the parties. This agreement was, in substance, that complainant should give his note dated September 12, 1885, payable in one year to the order of said company for one hundred and fifty dollars, with interest at eight per cent per annum from date, payable at the Lyman Bank, Sanford, Florida, and that the defendant, the Winter Park Company, should place a warranty deed to said lot in escrow with said bank. The said note and said deed were duly prepared by the parties, and were by the secretary of the Winter Park Company, but with the full knowledge and consent of the complainant, both placed in an envelope which was marked as follows: "The inclosed deed and note are hereby left in escrow with the Lyman Bank, Sanford, with the following conditions: In case the note is promptly and fully paid the deed is to be delivered to Charles S. Chabot, or order; otherwise the deed to be returned to the Winter Park Company, and the note to said Charles S. Chabot. For the Winter Park Company, J. S. Capen, secretary." The said note and deed inclosed in said envelope were deposited with the Lyman Bank in accordance with said agreement. The note was antedated, and by its terms was already past due at the time it was signed, but it was at said time verbally agreed by the parties to the ²⁶² transaction that it should become actually due and payable September 12, 1887. The bank

was advised of the time of the maturity of the note under the agreement. Before September 12, 1887, the date fixed for the payment of said note, the complainant wrote to the Winter Park Company that he would be unable to pay it at maturity; and thereupon the Winter Park Company instructed the bank to hold the papers on the same terms until January 1, 1888. Some weeks after this date, the complainant not having paid the note, the bank returned the papers to the Winter Park Company, and they were afterwards canceled. The complainant was at the time fixed for the payment of the note, and continuously afterwards, absent in the state of Massachusetts. It appears from a letter of the defendant, the Winter Park Company, to the complainant, dated October 24, 1888, which was attached as an exhibit to the bill of complaint, that it had written complainant several times in the spring of 1888, in reference to the lot, especially about the taxes upon the same, without obtaining any reply whatever. On June 14, 1888, the defendant, the Winter Park Company, sent a letter to the complainant by registered mail, and which was duly received by him. This letter read as follows:

"THE WINTER PARK COMPANY,
"WINTER PARK, ORANGE COUNTY, FLORIDA.

"June, 14th, 1888.

"Charles S. Chabot, Esq.,

"MY DEAR SIR: I enclose a statement of your account for Lot thirty, Block 31, of the town of Winter Park, which you bargained for from the Winter Park Co., on Sept. 12th, 1885, promising to pay the balance in one year from date at eight per cent interest. Not having carried out any part of that arrangement, this is to ³⁶³ notify you that if the balance (\$149.56) due as shown on the statement is not fully paid by or before July 20th, 1888, the aforesaid agreement will be null and void, and we shall take possession of the premises, and in our own name occupy, own, rent, or dispose of said property.

"Very resp'y,

"THE WINTER PARK CO.,
"Per J. S. Capen, Sec'ty."

The above was signed in the presence of Henry S. Chubb, J. H. Abbott.

This letter was accompanied by a statement of account which was as follows:

WINTER PARK, FLORIDA, June 14th, 1888.

C. S. CHABOT

In account with

1885	THE WINTER PARK Co.	Dr.	
Sept. 12.	To Lot 30, Block 31, of the town of Winter Park, as per contract.....		\$250 00
1887			
Decr. 16.	To putting glass in window		1 40
1888			
Jany. 31.	To taxes.....		8 42
			<hr/> \$254 82

1885		Cr.	
Sept. 12.	By cash.....		\$100 00
1887			
Oct. 17.	By cash rent Waas.....		10 00
Oct. 31.	By cash rent of kitchen. 2 00		
	Less fixing pump.....	50—	1 50
Nov. 19.	By cash rent Waas.....		10 00
Decr. 23.	" " " "		7 00
264 1888			
June 1.	" " " Klemmer...	10 00—	188 50
			<hr/> \$116 32
June 5.	To interest to date.....		83 24
			<hr/> \$149 56

The complainant paid no attention whatever to this letter, not even acknowledging receipt. On the 26th of July, 1888, the defendant, the Winter Park Company, sold and conveyed said lot to its codefendant, George B. Dorn, for three hundred dollars, and put him in possession of the same, the said defendant Dorn having full knowledge of the *status* of the contract between the complainant and his codefendant. The defendant, the Winter Park Company, had, according to their notice, taken possession of said property before selling the same to Dorn. The complainant by himself or his tenant had been in possession of the property a portion of the time intervening between the date of the sale and the retaking of possession by the defendant, the Winter Park Company, but what portion of said time is not shown by the record. The secretary of the Winter Park Company, acting for its benefit, had looked after the property, collected some rents, and accounted for the same to the complainant as part of the

purchase money, as shown by the statement of account hereinbefore set out. The complainant, a short time before November 16, 1889, tendered to the Winter Park Company the amount due, and demanded a deed to the premises. The complainant offered to pay the amount due, upon delivery of a deed to the premises, or to pay the money into the registry of the court. The tender having been refused, and the Winter Park Company refusing to make the deed, the bill of complaint ²⁶⁵ was filed November 16, 1889. Upon these facts the appellant contends that the court below should have granted one or the other of his prayers for relief; that, if the court below found that the complainant was not entitled to a specific performance of the contract, it should have retained the bill of complaint, and have allowed the complainant compensation for the improvements placed upon the lot by him, while he was in possession under his contract of purchase.

From the facts stated it appears that the Winter Park Company had been extremely liberal in extensions of time to the complainant, and endeavored to afford him full opportunity to comply with his contract. In granting such favors it canceled the original contract and made a new one, giving an extension of one year, or until September 12, 1887. At complainant's request it granted a further extension until January, 1888. After this date the complainant ceased, until October 16, 1888, long after the lot had been sold to Dorn, to have any communication with the Winter Park Company. Although it wrote him several times in reference to taxes upon the lot, and other matters connected with the same, he entirely ignored the letters, not even acknowledging receipt of them; and a reasonable conclusion from his actions in the matter was that he did not desire further negotiations with the company, and had abandoned his contract with them. During this interval the notice of June 16, 1888, hereinbefore set forth, was sent to complainant. Not only did he fail to comply with the notice, but it failed to elicit any reply whatever from him, beyond the receipt required to be given by the recipient of a registered letter by the United States postal laws and regulations. Upon the expiration ²⁶⁶ of the time limited in the notice the Winter Park Company canceled the contract, resumed possession of the property, and sold and conveyed it to Dorn.

It is admitted by all parties that the various extensions

granted the complainant amounted to an acquiescence in his failure to perform his contract, and kept the contract in force until the time limited in the notice of June 14, 1889. It is insisted by the appellant that time was not of the essence of the contract, and that the Winter Park Company had no right to make it such, or to put a limitation upon the time of performance by the complainant, by giving such notice. We agree that time was not of the essence of the original contract in this case; unless expressly stated so to be it is not generally so regarded in a court of equity: *Southern Life Ins. etc. Co. v. Cole*, 4 Fla. 359. While time may not be the essence of the original contract the principle is well established that where one party to a contract is guilty of laches and negligence to perform the same, and the time for performance has passed, the other party may, by giving notice, fix a reasonable time for the performance of the contract, and has the right to treat the contract abandoned if not complied with in such limited time: *Waterman on Specific Performance of Contracts*, secs. 465-483; 2 *White and Tudor's Leading Cases in Equity*, 1137; note to *Seton v. Slade*, and authorities cited; *Kirby v. Harrison*, 2 Ohio St. 326; 59 Am. Dec. 677. Although the complainant was in default, he made no reply whatever to the notice. If he had desired still further extension of time he should have let his wishes be known. If he considered that he had further rights in the matter, and that the Winter Park Company could not put a limitation of time upon ²⁶⁷ him, he should have been prompt in the assertion of such rights. Failing to ask any further extension or to assert any right, he must be held as acquiescing in the demand contained in the notice, and as abandoning all rights he might have had to enforce the performance of the contract: *Gentry v. Rogers*, 40 Ala. 442, 449. In order that such a notice have the effect to put a limitation upon the time for the performance of a contract the time fixed for the performance of the contract should be a reasonable time within which to do the act required. There cannot in the nature of things be any fixed rule as to what constitutes a reasonable time in such cases. It must depend upon the facts of each particular case. The time fixed for the performance of the contract in the notice in question was nearly forty days. The simple act required to be done was the payment of a sum of money. True the complainant lived in Massachusetts, and the defendant corporation was in Florida. We

cannot, however, close our eyes to what is a matter of common knowledge, that in this age of electricity and steam, in the facilities they afford for communication between different states of the union, and the transmission of money and other articles from one portion of the country to another, have practically annihilated distance and time. Under all the circumstances of the case we think the limitation of time fixed in the notice was a reasonable one.

There is another reason why we think the complainant was not entitled to specific performance of the contract: He did not come into court with sufficient promptness. While a court of equity will not, as stated, regard time as of the essence of a contract unless expressly made such by the contract itself, yet it will require that one who seeks specific performance of ~~268~~ a contract shall not be guilty of unreasonable delay, and shall seek his redress with reasonable promptness. The specific performance of a contract for the sale of lands is not a matter of right in either party, but rests within the sound reasonable discretion of a court of equity. This discretion will only be exercised where the complainant shows himself prompt and eager to perform the contract on his part, and to have same performed by the other party: *Knox v. Spratt*, 23 Fla. 64; *Van Doren v. Robinson*, 16 N. J. Eq. 256; *Goodwin v. Lyon*, 4 Port. 297; *Potter v. Dougherty*, 25 Pa. St. 405; *Gentry v. Rogers*, 40 Ala. 442, 448, and authorities cited. In this case the complainant had no agreement or understanding for any extension of time for performance of his contract after January 1, 1888. His laches after that time was of his own fault and willfulness, and without the consent of the Winter Park Company. He had been long in default when the notice of June 14, 1888, was sent to him. After this notice he made no protest or assertion of his rights; no payments or efforts for further extension of time. When defendant, the Winter Park Company, wrote to him, he ignored the letters. Then, after the notice of June 14, 1888, was given him, making no reply, he waited for considerably more than a year after the property had been sold to another party before he tendered the money and sought to perform his contract, or sought to have the deed made to him. The suit was brought November 16, 1889, nearly one year and four months from the expiration of the time limited in the notice. This we consider an unreasonable delay. What is a reasonable time within which to file a bill for the specific performance of

a contract cannot be fixed with precision by any general rule. In *Watson v. Reid*, 1 Russ. & M. 236, cited with approval in *Knox v. Spratt*, 23 Fla. 64, one year after default was held to be an unreasonable delay upon the part of a vendor. In *Gentry v. Rogers*, 40 Ala. 442, likewise cited in *Knox v. Spratt*, 23 Fla. 64, nine months was held to be unreasonable delay. The ground upon which delay in this class of cases is considered unreasonable is, that it raises a presumption that the party has abandoned the contract, and is equivalent to a consent to a rescission: *Knox v. Spratt*, 23 Fla. 64; *Waterman on Specific Performance of Contracts*, sec. 473, and authorities cited.

It is claimed by the appellant that although he might not have been entitled to a specific performance of the contract, yet that while he was a vendee in possession he made valuable improvements upon the land, and that the bill should have been retained, that he might recover compensation for these improvements. The alternative prayer of the bill is, that "said company be compelled to refund to complainant the difference between the fair value of said premises and the amount due said company." The "fair value" of the premises is not shown in the record. The price for which it was sold to Dorn and the value of improvements put upon it by the complainant are the only data throwing any light upon the subject of value of the premises. The case of *Lewis v. Yale*, 4 Fla. 418, asserts the general doctrine to be "that a court of equity cannot award compensation in damages for injury sustained by nonperformance of a contract, where the primary relief (specific performance) cannot be decreed." This case was upon the general subject of damages for the breach of contracts for the sale of lands, and the damages sought to be recovered were not on account of improvements erected upon the land. ²⁷⁰ The head-notes in the case of *Gliniski v. Zawadski*, 8 Fla. 405, say: "1. Where the object of the bill is to compel the 'specific performance' of a contract, if the prayer be denied (as a general rule), the bill will be dismissed; but there are exceptional cases, as where equity is found to have arisen between the parties to the contract growing out of its peculiar character or nature. In such case the bill may be retained for the purpose of having that equity adjusted; 2. Where one contracts to purchase real estate, and proceeds to erect improvements thereon, if compensation therefor be decreed him, the amount is to be based

upon the actual value of the improvements, or, at farthest, upon a reasonable allowance, and not upon the amount expended." We have no doubt that in a proper case the equities might be such that, where the prayer of the bill for specific performance is denied, the court would retain the bill, and adjudicate any other equities which had arisen between the parties. In cases where the vendee in possession had made valuable improvements upon the faith of his purchase, and the contract is such that specific performance thereof cannot be enforced, the vendor will be compelled to refund the purchase money, and to pay the actual value of the improvements: *Waterman on Specific Performance of Contracts*, sec. 281, and authorities cited. We find a large number of cases of specific performance of contracts for the sale of land, wherein the primary relief prayed for, i. e., specific performance, was denied, and yet compensation was allowed the complaining vendee for improvements put upon the land upon the faith of his contract. In all of these cases the complainant was free from fault, and specific performance was denied by reason of some defect in the contract, or noncompliance with the statute of frauds. ²⁷¹ These adjudications are reiterations of the doctrine everywhere enforced by courts of equity, that the statute of frauds should not be used as an instrument of fraud. We have been unable to find any case where compensation was allowed a vendee where his case failed, not from any technical defect in the form of his contract, but on account of his own laches, negligence, and disregard of his obligations. The appellant in this case may suffer some pecuniary loss from which we might wish to save him, but he is in a predicament into which he has gotten himself by his own conduct, and from which we are powerless to extricate him: *Hatch v. Cobb*, 4 Johns. Ch. 559; *Goodwin v. Lyon*, 4 Port. 297.

There is no error in the decree appealed from, and it is affirmed.

VENDOR AND PURCHASER—TIME WHEN OF ESSENCE OF CONTRACT, GENERALLY.—Time is not generally deemed in equity of the essence of the contract unless the parties have expressly so treated it: *Young v. Rathbone*, 16 N. J. Eq. 224; 84 Am. Dec. 151, and note; *Coleman v. Applegarth*, 68 Md. 21; 6 Am. St. Rep. 417, and note. When time is not expressly stated to be of the essence of the contract courts are reluctant to enforce forfeitures: *Sanford v. Weeks*, 38 Kan. 319; 5 Am. St. Rep. 748, and note.

VENDOR AND PURCHASER—BREACH OF CONTRACT—NOTICE.—When time is not made of the essence of a contract for the sale of land, it is incum

bent upon the vendor or his assignee who would terminate the contract, and insist upon a forfeiture, to give notice to the vendee and a reasonable time within which to do any act required of him: *Alexander v. Jackson*, 92 Cal. 514; 27 Am. St. Rep. 158, and note.

SPECIFIC PERFORMANCE—EFFECT OF LACHES.—Specific performance of a contract to convey land will not be decreed if there has been great delay in complying with the contract of purchase, or in filing a bill to enforce the rights of a party to such contract: *Hatch v. Kizer*, 140 Ill. 583; 33 Am. St. Rep. 258, and note.

SPECIFIC PERFORMANCE—DISCRETION OF COURT.—A decree for specific performance is not granted as a matter of course, but rests in the sound discretion of the court: *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672, and note, with the cases collected.

VENDOR AND PURCHASER—COMPENSATION FOR IMPROVEMENTS.—Although a parol agreement to convey land will not be specifically enforced, yet the party repudiating the contract will not be allowed to enjoy the benefit of permanent improvements put upon the land by one relying on such contract without compensation for the same: *Pitt v. Moore*, 99 N. C. 85; 6 Am. St. Rep. 489, and extended note; *Herring v. Pollard*, 4 Humph. 362; 40 Am. Dec. 653, and note. A *bona fide* occupant of land under a contract to purchase is entitled to charge for improvements exceeding the rent: *Ewing v. Handley*, 4 Lit. 346; 14 Am. Dec. 140; *Martin v. Atkinson*, 7 Ga. 228; 50 Am. Dec. 403. See, also, *Gibert v. Peteler*, 38 N. Y. 165; 97 Am. Dec. 785, and note; and the note to *Barrett v. Stradl*, 9 Am. St. Rep. 805.

REEL v. LIVINGSTON.

[34 FLORIDA, 377.]

FRAUDULENT CONVEYANCES—DEBTOR AND CREDITOR—WHAT SUFFICIENT TO CREATE RELATION OF.—The contingent liability of a surety is sufficient to create the relation of debtor and creditor within the meaning of the statute of frauds against the fraudulent alienation of property, and a note given for a pre-existing debt and renewed from time to time by the maker and surety continues the debt in force as originally made.

FRAUDULENT CONVEYANCES—PURCHASE BY HUSBAND FOR WIFE—RIGHT OF HUSBAND'S CREDITORS TO ATTACK.—The fact that property is purchased by the wife and partly paid for by the husband, and the deed taken in the name of the wife, coupled with an existing indebtedness of the husband, makes a *prima facie* case of fraud, and the creditor of the husband can subject the property in the hands of the wife or her legal representatives to his debt to the extent of the amount paid by the husband, unless the presumption of fraud is negated by the financial condition of the husband, and the circumstances at the time, or other rebutting evidence.

FRAUDULENT CONVEYANCES—SUFFICIENCY OF PLEADING TO SHOW.—An allegation in a bill in equity that the payment by the husband of a mortgage note given for the purchase money of property conveyed to the wife was for the convenience of the husband, and for the purpose

of defrauding, hindering, and delaying his just creditors, of which fact complainant was ignorant until recently before the filing of the bill, is an allegation of fraud in fact, and, coupled with a showing that the complainant, at the time of such settlement, sustained the relation of creditor to the husband, is sufficient of itself, if true, to maintain the bill and to subject the property in the hands of the wife to his debt, to the extent of the amount thus paid by the husband.

Massey & Wilcox, for the appellant.

E. R. Gunby, for the appellees.

378 MABRY, J. This is an appeal from a decree sustaining a demurrer to an amended bill filed in the Orange county circuit court by appellant. The allegations of the amended bill are in substance that the complainant therein, appellant here, on the fourth day of June, 1886, jointly executed a note with defendant J. H. Livingston, at 379 his request, to the order of the First National Bank of Orlando in the sum of \$1,681.85, but that complainant was in fact a mere surety on the note for the said Livingston; that on the twenty-eighth day of October following, said note, with the accrued interest thereon, was renewed, or a new note given in its place, by the said Livingston in the sum of \$1,817, with complainant still continuing thereon as surety, said renewed note to mature in three months; that subsequently, at divers times, the said Livingston, with complainant still continuing as surety thereon, jointly executed notes to the order of said bank to secure the sum of money first obtained, with accrued interest, the last renewal being on the twentieth day of November, 1888, at which time the original loan to Livingston, with its accruals of interest, was included in a note to the said bank for the sum of \$3,420, executed by the said Livingston and complainant jointly; that upon the maturity of the last-mentioned note complainant was compelled to and did pay the same, the said Livingston being either unable or unwilling to do so, and that, in order to recover said sum of money from Livingston, complainant instituted a suit in the Orange county circuit court in May, 1889, and recovered judgment against him for \$3,520; that execution has been issued upon said judgment and has been returned by the sheriff *nulla bona*, whereby complainant is unable to recover from said Livingston the money paid for his benefit and on his account. The bill, and its amendments, further alleges that in May, 1885, defendant Mary W. Livingston, wife of defendant J. H. Livingston, acquired by grant to her in fee simple lot five (5)

in Whilden's subdivision of Lucerne, property in the town of Orlando, together with the hotel thereon, known as the Lucerne House, and the furniture therein, subject to the lien of a ³⁸⁰ mortgage given to secure four purchase money notes, dated November 22, 1884, the first for the sum of five hundred dollars, and the other three each for \$1,666.66, and to mature respectively in thirty days, twelve months, two years, and three years from date; that the third one of said notes matured according to its terms about the twenty-second day of November, 1886, and previous to that time it had been sent to the bank for collection; that the title to the Lucerne House property was at the time of the maturity of said note, and at the time of filing the bill, in the name of the wife, Mary W. Livingston, and that the husband, J. H. Livingston, then being indebted to complainant on account of the suretyship on the said note to the bank, dated the twenty-eighth day of October, 1886, in order to discharge the lien of the said third purchase money note, secured the loan of a sum of money upon his interest in a certain lot in the city of Orlando, known as Block AA of W. A. Patrick's addition to said town, and with that and other of his money paid the said purchase money note for \$1,666.66; that at the time Livingston made this payment he had little or no property in his name subject to execution, with the exception of said lot in Patrick's addition; that his investment in said Lucerne House property was a voluntary settlement upon his wife; that it was for the convenience of Livingston, and for the purpose of defrauding, hindering, and delaying his just creditors, and that his wife knew he was apparently insolvent, and consented to such a voluntary settlement upon her; all of which facts complainant until recently was in ignorance. It is further alleged that the said hotel described as the Lucerne House had recently been destroyed by fire, and that it was insured against loss by fire in the Hartford Insurance Company for the sum of \$1,500, in ³⁸¹ the Western Insurance Company for the sum of \$1,000, in the American Insurance Company in the sum of \$500, in the Continental Insurance Company for the sum of \$500, and in the Springfield Insurance Company for the sum of \$1,500—aggregating in insurance the sum of \$5,000; that the lot of land on which said hotel was located was not sufficient to repay complainant the amount of money which he had been compelled to pay, and that, if the insurance money was paid to the said Mary

W. Livingston or her husband, complainant would be deprived of the means of recovering what was justly due him. The bill prays for injunction and process, and the special relief as to the property is that the lot on which the hotel was situated be decreed to be held in trust for the benefit of complainant to the extent of the money invested in the same by the husband while he was a debtor of complainant, and that the insurance money be decreed to be equitable assets of J. H. Livingston to the extent of the money invested by him in the Lucerne House property in favor of complainant.

The grounds of the demurrer are that there is no equity in the amended bill; that complainant does not show by his bill that any of his money went into the Lucerne House lot or hotel; and that, under the statements of the amended bill, no trust could arise, and for other good reasons appearing upon the bill.

Mrs. Livingston acquired the title to the Lucerne property, subject to the lien for purchase money, about one year before the debt, for which Reel was surety, was contracted, and it is not alleged that the purchase of the property by her was for the purpose of defrauding her husband's creditors, or on his account. It is distinctly alleged, however, that the husband discharged with his own means the third purchase money note, amounting to \$1,666.66, secured by the mortgage on the property purchased by the wife, and that the payment of this note was a voluntary settlement upon her. It is made to appear clearly from this allegation of the bill that \$1,666.66 of the husband's money went to discharge in part the purchase price of property bought by the wife, and that, to the extent of the sum mentioned, the husband contributed his own means to the acquisition of property by the wife. Complainant's status as a creditor of J. H. Livingston at the time he contributed his money to the satisfaction of the purchase money note against the wife's property is material, under the allegations of the bill, in determining complainant's right to follow the money mentioned, though it were given to the wife as stated. And this point introduces appellees' first contention, that it is not shown by the bill that appellant was a creditor of J. H. Livingston when he paid the purchase money note secured by a mortgage on his wife's property. It is not denied that the relation of debtor and creditor may exist within the meaning of the statute of frauds in cases of contingent liability where, at the time of the

them." The bill in the case before us further distinctly alleges that the payment of the third note given for the purchase money of the property purchased by the wife was for the convenience of the husband, and for the purpose of defrauding, hindering, and delaying his just creditors, of which fact complainant was in ignorance until recently before the filing of the bill. So we have in the bill demurred to not only an allegation that complainant was a creditor to a considerable amount, of Livingston when the latter made a voluntary settlement upon his wife, but an averment that the settlement was made for the purpose of delaying, hindering, and defrauding his creditors. This is an allegation of fraud in fact, and, coupled with the showing that complainant at the time of the settlement sustained the relation of creditor, is sufficient of itself, if true, to maintain the bill: *Robinson v. Springfield Co.*, 21 Fla. 203. There is no contention here that if complainant sustained the relation of creditor of Livingston, and that the latter's financial ²⁸⁶ condition was such at the time of the settlement as to condemn the transaction as fraudulent in law, or that if the settlement was fraudulent in fact the amount contributed to pay off the purchase money note against the wife's property cannot be reached in a court of equity. The fact that the purchase of the property was by the wife, and in her name, and its title was never in the husband, will not stand in the way of reaching the money contributed by him in securing the property to the wife: *Alston v. Rowles*, 13 Fla. 117. The result so far is, that upon the allegations of the bill, the complainant showed a right to charge upon the lot of land upon which the Lucerne Hotel was located the amount paid by J. H. Livingston towards the satisfaction of the purchase money demand against it, and that the bill should not have been dismissed on demurrer. The amended bill alleges that Mrs. Livingston acquired title to the Lucerne property in May, 1885, subject to the lien of purchase money notes amounting to \$5,000, but it is not alleged that she paid any sum of money on this purchase. The only allegation as to payment of purchase money on this property is the payment of the third note by J. H. Livingston in November, 1886. In the absence of allegations as to payments either by Mrs. Livingston or her husband other than the \$1,666.66 paid in 1886 there is no basis for a claim to subject the lot in question for more than the sum mentioned as having been paid. Nor can we see from the allegations of the bill any

just basis for a claim on the insurance money as equitable assets of J. H. Livingston. It is not alleged that he paid any money in effecting the insurance on the property, or that it was insured in his favor, or even for the benefit of his wife, or that she paid any money to secure the insurance. When ³⁸⁷ the insurance policies were issued, in whose favor issued, or how the premiums on the same were paid, is not definitely alleged, and such facts are not ascertainable by inference from the allegations made, and we do not see that complainant is entitled to any relief so far as a claim to the insurance money is concerned. Counsel have cited no authorities, and in fact have presented no argument in their brief to sustain the allegations of the bill in reference to the insurance money. But showing a ground of equitable relief as to the payment of purchase money on the premises by J. H. Livingston, complainant's bill should not have been dismissed, and we reverse the decree appealed from, and remand the cause for further proceedings. Ordered accordingly.

SURETYSHIP—DEBTOR AND CREDITOR.—RIGHT OF SURETY TO AVOID FRAUDULENT CONVEYANCES: See the note to *Choteau v. Jones*, 50 Am. Dec. 469. That a surety or indorser is a creditor, see the extended note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 744.

TRUSTEES OF INTERNAL IMPROVEMENT FUND v. LEWIS.

[34 FLORIDA, 424.]

COUPONS—NEGOTIABILITY.—Interest-bearing coupons attached to bonds and payable to bearer are, in legal effect, promissory notes, and possess all the attributes of negotiable paper.

COUPONS—NEGOTIABILITY—INTEREST.—Interest-bearing coupons attached to bonds and payable to bearer may be detached and negotiated separately by simple delivery, and sued on separately from the bond after the latter has been paid, as well as before. Such coupons once detached and negotiated cease to be mere incidents of the bond, and become independent claims, carrying interest after maturity.

NEGOTIABLE INSTRUMENTS—PAYMENT—FAILURE TO TAKE UP—COUPONS. A negotiable instrument paid before maturity should be surrendered to the payer to prevent further negotiation, for, if payment is made to the original payee and the instrument is not surrendered, but has been, or is thereafter, transferred before maturity to a *bona fide* holder, without notice, such holder can recover thereon against the maker notwithstanding such payment. This rule is here applied to interest coupons detached from bonds and payable to bearer.

BONDS—PAYMENT OF BEFORE MATURITY—FAILURE TO TAKE UP COUPONS.

The payment or cancellation of bonds before maturity to the holder thereof does not affect the interest-bearing coupons payable to bearer, and detached from the bonds, and transferred before maturity to, and in the hands of, another *bona fide* holder.

F. T. Myers, for the appellants.

R. W. Williams, for the appellee.

⁴²⁵ TAYLOR, J. The appellees sued the appellants as trustees of the internal improvement fund of the state of Florida by bill in equity in the circuit court in Leon county to compel them as such trustees to pay twenty-five interest coupons for the sum of thirty-five dollars each, representing the semi-annual installments of interest falling due upon the first days of March and September in the years 1889 and 1890, and on the 1st of March, 1891, upon five bonds for the sum of one thousand dollars each, numbered respectively 1075, 1233, 1234, 1235, and 1240, issued on March 1, 1856, by the Florida Railroad Company, under and in accordance with the provisions of the act of the legislature of Florida passed January 6, 1855, entitled "An act to provide for and encourage a liberal system of internal improvement in this state," the principal of which bonds was payable on March 1, 1891. The coupons sued upon, making allowance for the different dates when they respectively fall due, and their reference to the different numbers of the bonds to which they were attached, are in the following form:

"The Florida Railroad Company will pay the bearer, in the city of New York, thirty-five dollars on the first day of March, 1889, for semi-annual interest on bond No. 1075.

"\$35.

GEO. W. CALL, for treasurer."

The bill alleges that the complainant in December, 1882, became the owner and holder for value of said twenty-five coupons before their maturity. That payment thereof from said trustees had been demanded and refused. The answer admits that said bonds, ⁴²⁶ with interest coupons attached, were issued under and in pursuance of said act of the legislature creating said internal improvement fund, and admits that by the provisions of said act the said interest coupons were secured and guaranteed by the fund in their hands as trustees.

The answer denies that the complainant is a *bona fide* holder of said coupons, and that he acquired them before maturity without notice.

There was no proof, however, otherwise than that the complainant *bona fide* became the holder and owner of said coupons for value before their maturity. The answer further urges as a defense that prior to the time when the complainant acquired said coupons, and long before their maturity, the bonds themselves, the semi-annual interest upon which is represented by said coupons, were bought and canceled by said trustees under the provisions of said Internal Improvement Act, and said bonds became no longer an existing obligation, and ceased to bear interest.

The evidence taken shows that the complainant is a *bona fide* holder of the coupons sued upon, and that he became such owner for value in good faith before their maturity, as detached independent obligations, and without notice that the principal bonds, of which they formed a part, had been taken up or canceled. It is shown that the defendant trustees have acquired the possession and control of all the bonds from which said coupons were detached, and that they acquired possession of them about December 26, 1882, denuded of all coupons. How, or from whom they were acquired, is not shown, nor upon what consideration. Neither is it shown that said bonds were ever canceled. At the final hearing of the cause on October 9, 1890, final decree was rendered requiring the defendants, ⁴²⁷ as trustees, to pay the amount of the twenty coupons then past due, together with interest thereon, from the dates of their respective maturity up to the date of said decree, and interest upon the decree until its payment, and that the five coupons not then due should be withdrawn from the suit. From this decree the defendant trustees have appealed.

It is conceded that, under the provisions of the Internal Improvement Act already mentioned, the fund in the hands of the defendant trustees was pledged as a guarantee for the payment of the interest upon the railroad bonds that is represented by the coupons sued for, and that said fund was liable originally as a guarantee for the payment of said coupons. The sole contention here is, that the principal of the bonds having been taken up and canceled by the trustees prior to the accrual and maturity of the installments of interest represented by these coupons, that such bonds ceased, from the time they were so taken up and canceled, to bear interest, and that the interest represented by said coupons consequently never did accrue or become due. However plausible

this contention, at first blush, may appear, it is not in accord with the settled principles of law governing such negotiable instruments as are sued on here, and that must govern the obligor in the payment of such instruments when he desires that a discharge from further liability shall result from such payment. The coupons sued upon are payable to bearer; and, according to well-settled law, are in legal effect promissory notes, and possess all the attributes of negotiable paper: 4 Am. & Eng. Ency. of Law, 432, and citations. They are transferable by delivery, although detached from the bonds; and it has been held that a purchaser, in good faith, before maturity, from one, even, who has stolen them, acquires a valid ⁴²⁸ title: *Evertson v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9; *Arents v. Commonwealth*, 18 Gratt. 750; *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491; *Murray v. Lardner*, 2 Wall. 110; *Hotchkiss v. National Banks*, 21 Wall. 354. It is further well settled that such coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond after the bond itself has been paid and satisfied, as well as before; and that coupons once detached and negotiated cease to be mere incidents of the bond, and become independent claims, and that they carry interest after their maturity: *National Ex. Bank v. Hartford etc. R. R. Co.*, 8 R. I. 375; 5 Am. Rep. 582; 91 Am. Dec. 237, and cases there cited; *Morris Canal Co. v. Fisher*, 9 N. J. Eq. 667; 64 Am. Dec. 423, with numerous citations in notes at 432; *Welsh v. First Div. St. Paul etc. R. R. Co.*, 25 Minn. 314; *Thomson v. Lee County*, 3 Wall. 327; *Clark v. Iowa City*, 20 Wall. 583; *Stewart v. Lansing*, 104 U. S. 505; *Gelpcke v. City of Dubuque*, 1 Wall. 175.

It is further well settled that where a negotiable bill or note is paid before maturity it is especially important that it should be surrendered to the payer, so that further negotiation may be prevented; for, in such case, if payment is made to the original payee and the note is not surrendered, but has been already, or should be afterward, transferred before maturity to a *bona fide* holder, without notice, such holder can recover thereon against the maker notwithstanding such payment to the original payee: 3 Randolph on Commercial Paper, sec. 1418, and citations; Tiedeman on Commercial Paper, secs. 373, 374, and citations; 2 Daniel on Negotiable Instruments, secs. 1230-1233, and citations; 18 Am. & Eng. Ency. of Law, 190, and citations.

429 In the case at bar the defendants as trustees were liable only for the payment of the interest upon these bonds represented by the coupons attached thereto. If they bought the bonds themselves for cancellation before their maturity, as they allege, it especially behooved them to see to it that the unmatured interest coupons, representing interest installments not yet accrued, were delivered up to them so as to put a stop to the further negotiation thereof to *bona fide* and innocent holders; and this for the reason that the coupon attachments, representing the accruing interest, were in fact the only part of the bonds for which they were bound as guarantors. As before shown, these coupons, when detached from the bonds before their maturity, became independent claims, and were no longer mere incidents of the bond; and become at once possessed of all the attributes of negotiable mercantile paper, and the payment or cancellation of the bond before maturity to the holder of such bond cannot affect such coupons that have been detached and transferred before maturity to another *bona fide* holder. The defendants, if they have bought up the principal of the bond before its maturity, denuded of its interest coupons, that were before such purchase and cancellation detached therefrom and transferred to a *bona fide* holder, have ill-advisedly made payment to the wrong payee, or else have not paid at all that part of the bond for which they were alone liable.

The decree of the court below is affirmed with costs.

COUPONS—NEGOTIABILITY OF.—Corporate coupon bonds payable to bearer are negotiable: *Mason v. Frick*, 105 Pa. St. 162; 51 Am. Rep. 191. Coupon bonds payable to bearer are transferable by delivery so as to confer a complete title upon the possessor, not as instruments negotiable under the law merchant, but as instruments of a peculiar character expressly designed to be passed from hand to hand, and by common usage actually so transferred: *Morris Canal etc. Co. v. Fisher*, 9 N. J. Eq. 667; 64 Am. Dec. 423, and extended note at pages 429, 432. See, also, the note to *Miller v. Rutland etc. R. R. Co.*, 94 Am. Dec. 424.

COUPONS—EFFECT OF DETACHING ON NEGOTIABILITY.—Coupon bonds are negotiable, and the coupons may be detached and negotiated separately by simple delivery, and sued on separately from the bond: *National Exchange Bank v. Hartford etc. R. R. Co.*, 8 R. I. 375; 91 Am. Dec. 237, and note; 5 Am. Rep. 582. The coupons to negotiable bonds are themselves negotiable instruments when detached, provided they are negotiable in form, and they are governed by the same rule as other negotiable instruments: *Everton v. National Bank*, 66 N. Y. 14; 23 Am. Rep. 9, and extended note. To the same effect, see *McClelland v. Norfolk etc. R. R. Co.*, 110 N. Y. 469; 6 Am. St. Rep. 397, and note.

HUNT v. CITY OF JACKSONVILLE.

[84 FLORIDA, 504.]

JURY TRIAL, CONSTITUTIONAL RIGHT TO—MUNICIPAL OFFENSES.—A constitutional provision, providing that “the right of trial by jury shall be secure to all, and remain inviolate forever,” does not extend the right of jury trial, but merely secures it in cases in which it was matter of right before the adoption of the constitution. Hence, trials for municipal offenses, conducted without juries, prior to the adoption of such constitutional provision, may be conducted thereafter without a jury, and are not within such constitutional guaranty.

JURY TRIAL—RIGHT TO FOR MUNICIPAL OFFENSES.—It is no objection to a municipal ordinance creating an offense against the city government, and prescribing penalties therefor, that the trial thereunder is without a jury.

MUNICIPAL CORPORATIONS—ORDINANCE CREATING OFFENSE OUT OF ACT MADE PENAL BY STATE LAW.—A municipality may, by ordinance, create an offense against municipal law out of the same act already constituting an offense against state law. The two are then distinct offenses, punishable by both the municipality and by the state, and a conviction or acquittal by the one is no bar to prosecution and punishment by the other.

CERTIORARI AS WRIT OF REVIEW.—The writ of *certiorari* cannot be used to serve the purpose of a writ of error or appeal with bill of exceptions. The granting of the writ is not a matter of right, but in the legal discretion of the court; and, in order to review and quash the proceedings of an inferior tribunal upon such writ, the court must have proceeded in the case without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or essentially irregular.

R. H. Liggett, for the appellant.

J. M. Barrs, for the appellee.

505 TAYLOR, J. The petitioner, Meade Hunt, was tried and convicted in the municipal court of the city of Jacksonville upon a charge of having, on the thirty-first day of July, 1894, disturbed the public peace of said city by committing an assault and battery upon one Burt G. Dyal, in a place of general resort within the city limits of the city of Jacksonville, in violation of an ordinance of said city in such cases made and provided. A fine was imposed upon him of five hundred dollars. At the trial before the municipal court he pleaded to the jurisdiction of that court to try him for the offense charged, upon the ground that under the constitution he was entitled to a trial by jury, and that the municipal court could not give him a jury trial. This plea was overruled, and, 506 as before stated, he was tried against his protest without a jury, convicted, and sentenced. From this

judgment he took writ of error to the circuit court of Duval county. The circuit court rendered judgment affirming the judgment of the municipal court. He now presents his petition to this court, setting up the above facts, and therein prays for a writ of *certiorari* to the said circuit court for Duval county, commanding it to send to us here a complete transcript of the record of the judgment and proceedings in said cause, and that the said judgment of affirmance may be quashed.

In support of the application for the writ the only contention of the counsel for the petitioner is, that under our constitution, that provides (Const., sec. 3, Declaration of Rights) that "the right of trial by jury shall be secure to all, and remain inviolate forever," the municipal court had no jurisdiction to try and punish him for the offense charged, because it could not try by jury, and that the defendant was entitled to a jury trial. That the offense charged, though disguised in the city ordinance as being simply a breach of the peace of the city, was in reality the crime of assault and battery, made an indictable misdemeanor by the state law, and that upon a trial therefor he was entitled to a jury. That because he was not tried by jury the whole proceeding is void, and should be quashed.

In the case of *Theisen v. McDavid*, 34 Fla. 440, decided at the present term, we have held that it is no objection to a municipal ordinance creating an offense against the city government, and prescribing penalties therefor, that the trial thereunder is without a jury. This, we think, is well settled by the great weight of the authorities. The penalties permitted by legislative ⁵⁰⁷ authority to be inflicted by municipalities for infractions of their ordinances are usually limited within narrow bounds, so that they are generally trivial in character; and the reason advanced as to why the trials under such ordinances can be conducted without a jury, and without violating the constitutional guaranty, is, that the constitutional provision does not extend the right, but merely secures it in the cases in which it was matter of right before the adoption of the constitution. Such trials were conducted generally without juries prior to the adoption of our constitution, and, consequently, do not fall within the constitutional guaranty: 24 Am. & Eng. Ency. of Law, 504, et seq., and citations; Proffatt on Jury Trials, sec. 95, and citations; 1 Dillon on Municipal Corporations, 4th ed., sec. 432.

The contention that the charging of the offense here as being "a breach of the public peace of the city," is a subterfuge, and that the real offense charged is that of "assault and battery," and punishable by the state law, is without merit. In *Theisen v. McDavid*, 34 Fla. 440, we have fully discussed the power of the municipality to create an offense, as against municipal law, out of the same act that constituted an offense already against state law; and that the two were distinct offenses, and could be punished by both the municipality and by the state; and that the conviction or acquittal by the one would be no bar to prosecution and punishment by the other; that though flowing from the same act the offenses were double, separate, and distinct. The case here presented furnishes a clear illustration of the doctrine there announced. The same act here constitutes, as an infraction of the state law, the crime of "assault and battery," and is punishable as such under the state law; as an infraction ⁵⁰⁸ of the municipal ordinance, it constitutes the offense of a "breach of the public peace of the city"; and, under the ordinance, is punishable as such; and thus we have two clearly defined crimes flowing out of and originating in the same act.

In the case of *Jacksonville etc. Ry. Co. v. Boy*, 34 Fla. 389, decided also at the present term, we held that, in order to review and quash the proceedings of an inferior tribunal upon the common-law writ of *certiorari*, the inferior tribunal must have proceeded in the cause without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or essentially irregular; and that the writ is not permitted to serve the purpose of a writ of error or appeal with bill of exceptions; and that the granting of the writ was not a matter of right, but vested in the legal discretion of the court. We cannot see that there was any such want of jurisdiction over the cause in either the municipal court of Jacksonville, or in the circuit court of Duval county, to which the petitioner took writ of error; or that there was any such illegality or irregularity in the proceedings of either court as would authorize us, upon a writ of *certiorari*, to quash or interfere with such proceedings. The application for the writ is therefore denied.

TRIAL BY JURY FOR VIOLATION OF MUNICIPAL ORDINANCE.—Trial by jury cannot be constitutionally demanded in connection with a prosecution for violation of a municipal ordinance: *State v. Fourcade*, 45 La. Ann. 717; 40

Am. St. Rep. 249, and note. See, further, the extended note to *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 191.

MUNICIPAL CORPORATIONS—POWER TO PUNISH FOR OFFENSES MADE PENAL BY STATE LAW.—Though an act is made penal and punishable by the laws of the state, a municipality may also make it punishable and authorize proceedings for the imposition of such punishment: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663, and note, with the cases collected.

CERTIORARI CANNOT SERVE THE PURPOSE OF AN APPEAL OR WRIT OF ERROR: See the extended note to *Wulzen v. Board of Supervisors*, 40 Am. St. Rep. 30.

WEBSTER v. CLARK.

[34 FLORIDA, 637.]

PARTNERSHIP—LIABILITY OF ONE HELD OUT AS PARTNER.—One who is not actually a partner, and who has no interest in a partnership, cannot by reason of having held himself out to the world as a partner be held liable as such on a contract made by the partnership with one who has no knowledge of the holding out.

PARTNERSHIP—LIABILITY OF ONE HELD OUT AS PARTNER.—Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists he is never to be charged as a partner, unless, by contract and with intent, he has formed a relation in which the elements of a partnership are to be found.

PARTNERSHIP—AGREEMENT FOR.—If an agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing, free from ambiguity or doubt, its legal effect must be determined, as a matter of law, and the intention of the parties gathered therefrom; but, if the language employed leaves the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect.

PARTNERSHIP—WHAT CONSTITUTES.—A trade arrangement entered into upon such a basis that the parties thereto have a community of interest in the capital stock engaged therein, and a community of interest in the profits resulting therefrom, constitutes a partnership and the parties thereto partners.

PARTNERSHIP—WHAT CONSTITUTES.—Parties having a community of interest in the capital employed in, and in the profits derived from, a business are partners as to third persons.

PARTNERSHIP—AGREEMENT FOR—WHAT CONSTITUTES.—A written agreement disclosing a transaction in which the parties thereto have a community of interest in the capital employed, as well as a community of interest in the profits arising therefrom, constitutes them partners as to third persons, and liable as such, notwithstanding the fact that the transaction is sought to be concealed under the guise of a lease.

A. W. Cockrell & Son, for the appellant.

J. E. Hartridge and W. B. Young, for the appellees.

638 MABRY, J. Defendants in error, as partners under the firm name of John Clark, Son & Co., sued plaintiff in error

and E. Rigney as late partners, doing business in the firm name of E. Rigney & Co., in an action of *assumpsit* for goods sold and delivered to the latter firm by the former. Webster interposed pleas that he was never indebted as alleged, and that he was not a partner of Rigney, under the firm name and style of E. Rigney & Co., as set up in the declaration. Rigney did not defend. A trial before a referee resulted in a judgment in favor of plaintiffs below against defendants Webster and Rigney, as late partners doing business under the firm name of E. Rigney & Co., for the amount of plaintiffs' demand, and Webster sued out ⁶³⁹ a writ of error from the judgment. Rigney has refused to join in the writ of error, and the prosecution of the same here is on behalf of Webster alone.

Rigney bought the goods sued for, being such as are usually sold in a saloon business, and the only question involved is whether or not Webster can be held liable as a partner of the firm of E. Rigney & Co. Plaintiffs introduced in evidence the following instruments in writing, viz:

"STATE OF FLORIDA, }
"County of Duval. }

"THIS INDENTURE made this fifteenth day of February, A. D. 1886, by and between Nathaniel Webster, of Gloucester, Massachusetts, of the first part, and Edward Rigney, of Jacksonville, Florida, of the second part, *witnesseth*: That the party of the first part, for and in consideration of the rents, covenants, and agreements hereinafter mentioned, reserved, and contained on the part and behalf of the party of the second part to be paid, kept, and performed, hath leased and demised, and by these presents doth lease and demise unto the party of the second part for the full period and term of fourteen months from the date of these presents, the billiard and bar room on Julia street in the Everett Hotel in the city of Jacksonville, Florida, with all the furniture contained therein, excepting the bar and bar fixtures and billiard-tables and their equipments, which are to be paid for and owned equally by Nathaniel Webster and Edward Rigney. And the party of the second part shall pay unto the party of the first part the sum of two hundred and eight dollars and thirty-three cents per month in advance, and also such other sum of money as shall equal one-half of the net profits of the billiard and bar room hereinbefore mentioned. And it is also distinctly ⁶⁴⁰ understood and agreed by both parties

that the net profits may consist of cash and goods on hand after all necessary bills and expenses shall have been paid.

“NATHANIEL WEBSTER. [SEAL]

“EDWARD RIGNEY. [SEAL]

“Signed, sealed, and delivered in presence of

“S. I. Bradley.

“P. F. Wethington.”

“JACKSONVILLE, FLA., Feb. 15, 1886.

“It is understood that there shall be no net profits until Mr. E. Rigney receives, as compensation for his services and for the use of money advanced by him to pay for the bar and bar fixtures and billiard-tables and billiard fixtures to carry on the business, a sum equal to the amount of rent paid Mr. Nathaniel Webster.

NATHANIEL WEBSTER.

“EDWARD RIGNEY.

“Witnesses:

“S. I. Bradley.

“P. F. Wethington.”

Witnesses were examined for plaintiffs and defendants, and among them Rigney testified as a witness for plaintiffs, and Webster testified in his own behalf. It appears from the record that all objections to the testimony were reserved for final discussion and disposition by the referee, but it is not shown that any objections were made to the testimony either before or at the final hearing.

It appears from testimony before us that J. M. Lee operated the Everett Hotel in Jacksonville as proprietor during the season of 1885 and 1886, and for that time he let Webster have the wine and saloon privilege of the hotel for one thousand dollars. On settlement between Lee and Webster this amount was reduced in consequence of the late opening of the hotel to three hundred and thirty-three dollars and thirty-three cents. ⁶⁴¹ Lee receipted E. Rigney & Co. for the reduced amount, and it is recited in the receipt that the understanding was that Rigney & Co. should pay one thousand dollars for the season of 1886 and 1887. In arranging for the wine and liquor privilege of the hotel Lee negotiated with Webster personally, and, while he knew that Rigney was to have charge of the bar-room in the hotel, he did not know what was the understanding or contractual relation between Webster and Rigney.

Rigney testified that he and Webster were equal partners in the saloon business in the Everett Hotel, and that the part-

nership was carried on under the written agreements above recited. He stated that the firm name of the partnership was not set out in the agreement, because Webster did not want it known that he was a partner in the business, and that he (Rigney) did not disclose the fact unless it was necessary to do so. In making application for United States revenue license, which he did in the name of E. Rigney & Co., he was informed that the individual names of the partners would have to be set out in the sworn application, and in the presence of Webster the application was made before the revenue officer in the name of Edward Rigney and Nathaniel Webster, doing business in the firm name of E. Rigney & Co. The deputy revenue collector testified that he, by request, went to where Webster and Rigney were in the hotel, and informed them of the necessity of inserting the individual names of the partners in the application for license, and that Webster's name was inserted in his presence, and that he then stated that he was a partner in the business. Rigney also stated that for the season of 1886 and 1887 he paid Webster five hundred dollars, one-half of the hotel privilege, and a check for this ⁶⁴² amount, payable to the order of Webster and indorsed by him, was introduced in evidence. J. H. Spillman, a traveling salesman at the time for a manufacturing establishment of billiard-tables and saloon fixtures, testified for plaintiffs that he visited Jacksonville and sold billiard-tables to Nathaniel Webster for E. Rigney & Co., and that Webster stated to witness that he was a partner in the company of E. Rigney & Co. Also that Rigney informed witness that Webster was doing the buying for the firm. W. H. Hellen testified that he was bartender at the saloon in the Everett Hotel for ten or twelve weeks, and during that time Nathaniel Webster was often in the bar, and told witness what to do. On one occasion Webster directed witness to open the bar earlier in the morning than he had been in the habit of doing, and would order drinks and not pay for them, and they were not charged to him.

The goods sued for, it seems, were bought by Rigney in person, and the original entries were against him individually, but the journal account of plaintiffs was against E. Rigney & Co.

Webster denies that he was ever a partner of Rigney, and states that the only relation between them was that of landlord and tenant under the written agreements hereinbefore

mentioned, and which had not been changed during the continuance of the saloon business by Rigney in the Everett Hotel. He says that the writings were not intended to create a partnership, and that it was understood between the parties thereto at the time that no partnership should exist thereunder. The purpose of the writings, as testified to by Webster, was to definitely fix the relation of landlord and tenant, and that the rent was fixed at so much certain, and a further sum dependent upon the net profits of the business to be conducted by Rigney.

¶ One witness testified that he frequently visited the bar with Webster, and that the latter when ordering drinks would pay for them as other customers, and that witness saw no difference in that respect between Webster and other customers. Rigney, in rebuttal, denied that it was understood at the time the writings were drawn up that no partnership was to exist between the parties; but, on the contrary, it was distinctly understood that they were equal partners under the agreements, and that before the execution thereof Webster wrote letters to him in reference to a copartnership between them. The record shows that in portions of letters from Webster to Rigney reference is made to the purchase of cash machines for the saloon business, and Webster says in the letter that he wrote to parties "describing our bar, and inquiring of them if we could not make one machine answer our purpose; that we should not have but one cashier for both bar and billiard room." And after stating that two machines had been ordered, he says: "I thought we might save the price of both machines in one season." The saloon business was conducted in the name of E. Rigney & Co. There was no testimony in reference to a knowledge on the part of the plaintiffs of the facts above recited, or of any connection of Webster with the firm of Rigney & Co. before the goods were sold and delivered.

It is contended for plaintiff in error that if Webster held himself out, or permitted himself to be held out, to the world as a partner of the firm of E. Rigney & Co., liability for the goods sued for would attach to him, although he was not in fact a partner of said firm. It is true that one who holds himself out, or permits himself to be held out, as a partner may be held liable as such, independent of the actual existence of such ¶ relation; but the liability in such a case rests upon the principle of estoppel, that by holding himself out, or permitting himself to be held out, as a partner he has

induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the person so held out as a member of the firm. As the liability in such a case rests solely upon the ground that one cannot be permitted to deny a partnership relation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no just foundation for holding one liable as a partner when in fact he was not one, although held out as such, when the creditor did not know of the holding out, and did not act upon the supposition that the person sought to be charged was a partner in a firm when dealings were had with and credit given to said firm. The rule is correctly stated, we think, in the case of *Thompson v. First Nat. Bank*, 111 U. S. 529, where it was held that a person who is not actually a partner, and who has no interest in the partnership, cannot, by reason of having held himself out to the world as a partner, be held liable as such on a contract made by the partnership with one who had no knowledge of the holding out: *Wood v. Pennell*, 51 Me. 52; *Cook v. Penrhyn Slate Co.*, 36 Ohio St. 135; 38 Am. Rep. 568; *Hicks v. Cram*, 17 Vt. 449; *Seabury v. Bolles*, 51 N. J. L. 103. In this connection it may be stated, as was observed in the case of *Thompson v. First Nat. Bank*, 111 U. S. 529, that there may be cases in which the holding out has been so public and so long continued that a jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. On the testimony before us it cannot successfully be maintained that the plaintiffs below were entitled to a ⁶⁴⁵ judgment on the ground that Nathaniel Webster held himself out to the world as a partner of Rigney, if he were not in fact such partner. There is no testimony that the plaintiffs believed, or had any reason to believe, that Webster was a partner. There is testimony that he stated to the revenue officer and to the traveling salesman, Spillman, that he was a partner, but we do not know that plaintiffs were ever informed of such declarations before the goods were sold to Rigney & Co. The further fact, testified to by another witness, that Webster was often in the bar-room and gave directions to the bartender, in the absence of any showing that plaintiffs were cognizant of such facts, if they existed, will not justify a finding against Webster solely on the ground that he held himself out to the world as a partner. If the finding of the referee can be sustained on

the testimony before us it must be on the ground that Webster was in fact a partner of the firm of E. Rigney & Co.

As to partnership liability it was formerly broadly laid down that every one who shared in the profits of a trade or business ought also to bear his share of the losses, for the reason that, by taking a part of the profits, he takes a part of the fund of the business upon which the creditors had a right to rely for payment. This was the rule announced in the case of *Waugh v. Carver*, 2 H. Black. 235. In the application of this rule the courts began to add qualifications, and to make distinctions that were not of easy application. It was said, in some cases, that a sharing in the profits, in order to render one liable as partner, must be a participation therein as principal, and the test applied in other cases was, that the party entitled to a part of profits was a partner, if he had a lien thereon as against the private creditors of the other ⁶⁴⁶ members of the firm. The question was very much discussed in England in the case of *Cox v. Hickman*, 8 H. L. Cas. 268, and it seems to be generally conceded that this case modified materially the rule formerly announced on the subject. It is said of this case that it brought back the English law to the true rule. The facts, in brief, were, that two merchants became embarrassed, and assigned their partnership property to trustees, with direction and authority for them to carry on the business in a new name, and pay the net profits ratably among the creditors of the assignors, and, after the creditors were paid, the residue to go to the assignors. The creditors joined in the deed of assignment, and a majority of them had authority to make rules for the conduct of the business, or to end it if they saw proper. Debts were contracted by the trustees in conducting the business under this management, and it was held that the creditors were not liable as partners for the debts. Several opinions were rendered in the case, and those of the majority do not seem to rest upon the same grounds. It has been considered that the decision put the liability of one partner for the acts of his copartner upon the doctrine of the liability of a principal for the acts of his agent, the test of liability being in the fact that one has authorized the managers of the business to carry it on for him, and that, while the right to participate in the profits was cogent, it was not conclusive, evidence that the business was carried on in part for the person receiving a part of the profits. There is found in the books a great deal of discus-

sion on the subject of partnership liability. The following authorities, among the many, contain a thorough review of the decisions on the old rule, as it is called, and the modifications thereof: *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Culley v. Edwards*, 44 Ark. 423; 51 Am. Rep. 614; *Denny v. Cabot*, 6 Met. 82; *Meehan v. Valentine*, 145 U. S. 611; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465. This court, in the case of *Dubos v. Hoover*, 25 Fla. 720, quoted with approval the definition of a partnership given by Judge Story, viz: "Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them": Story on Partnership, 6th ed., sec. 2. It seems that when Judge Story wrote his book on Partnership he conceived the liability of one sought to be charged as a partner to rest upon the law of principal and agent, and his view is quoted with approval in one of the opinions delivered in the case of *Cox v. Hickman*, 8 H. L. Cas. 268.

A reference to agency as a test of partnership has not, it seems, proven a correct guide in many cases, as agency results from partnership rather than partnership from agency. It is said in *Meehan v. Valentine*, 145 U. S. 611: "Such a test seems to give a synonym, rather than a definition, another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner who stands in the relation of principal to those by whom the business is actually carried on adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent." In this case it is said: "The requisites of a partnership are that the parties must ⁶⁴⁸ have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits." Judge Cooley says for the court, in *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465, "That in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous,

and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of a partnership are to be found." 'The same view is announced in the recent English case of *Mollwo v. Court of Wards*, L. R. 4 P. C. App. Cas. 419. And in section 49 of his work on Partnership, Judge Story says: "In short, the true rule, *ex aequo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

Where the agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing and free from ambiguity or doubt, its legal effect must be determined as a matter of law, and the intention of the parties gathered therefrom. ⁶⁴⁹ We quote the language of Judge Cooley in the case referred to as expressive of the correct rule: "It is nevertheless possible for parties to intend no partnership and yet form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'" The last expression is quoted by him from Chancellor Kent in *Post v. Kimberly*, 9 Johns. 470. The test of partnership, then, is to be found in the intent of the parties themselves as shown by the contract which they make. Where parties enter into a trade arrangement upon such a basis as that they have a community of interest in the capital stock engaged in the business, and also a community of interest in the profits resulting

therefrom, the uniform rule is that they will be held to be partners in such a venture: *Dame v. Kempster*, 146 Mass. 454. On the other hand, it has always been held that an agent or servant, whose compensation is measured by the profits of a partnership business, is not thereby made a partner. In *Holmes v. Old Colony R. R. Corp.*, 5 Gray, 58, it was held that a railroad corporation by leasing a house owned by it to a party to be run as a hotel, the lessee to pay a certain sum annually, and half the net proceeds arising from keeping the house, and keep an account open for inspection by the corporation, and have free passage over the railroad for himself and all persons ⁶⁵⁰ employed, and all articles used in carrying on the hotel, did not thereby become partner in the hotel business. The mere leasing of a hotel for a certain part of the net profits will not make the lessor a partner in the hotel business. This was decided in *Beecher v. Bush*, 45 Mich. 188, 40 Am. Rep. 465. Nor does the renting of a building for a saloon under an agreement to take half of the profits made out of the business done therein as rent make the renter a partner in the business: *Thayer v. Augustine*, 55 Mich. 187; 54 Am. Rep. 361. In another case the plaintiff contributed toward the business his manufactory, shops, tools, implements, and machinery, and the land upon which they were situated; the defendants were to furnish a certain sum as capital, and labor to carry on the business. Defendants were to account to the plaintiff at reasonable periods for the proceeds of the business or the profits thereof, and all daily transactions were to be entered on the books, to which plaintiff was to have access, and at stated periods an account was to be taken of the profits, which, after deducting the costs and expenses of running the works and certain expenses, were to be divided between the parties. It was held that there was a community of interest in the capital to carry on the business, and also a community of interest in the profits, and a partnership was thereby created: *Wood v. Beath*, 23 Wis. 254.

The writings produced in evidence in the case before us must be considered together as one instrument. They were executed on the same day, and it is not questioned that they were intended to express the agreement of the parties on the subject to which they relate. The agreement contains formal parts of a lease, reciting, in substance, that in consideration of the rents, covenants, and agreements therein contained to

be paid, kept, and performed on the part of the second ⁶⁵¹ party, the first party doth lease and demise for the term of fourteen months the billiard and bar room on Julia street in the Everett Hotel, in the city of Jacksonville, for two hundred and eight dollars and thirty-three cents, in advance, per month, and a further sum equal to one-half of the net profits of the billiard and bar room mentioned. There are clauses as to the ownership of the bar and bar fixtures, billiard-tables and their equipments, and as to the ascertainment of the net profits. The mere form of the agreement cannot alone determine its legal effect, nor is the difference between receiving a sum equal to one-half of the net profits and a sharing in the profits themselves material, if it was in fact intended by the instrument that Webster should have one-half of the net profits of the bar business. If the agreement amounts to nothing more than a lease from Webster to Rigney of the Everett billiard and bar room for two hundred and eight dollars and thirty-three cents per month, and a further sum equal to one-half of the net profits resulting from the bar and billiard business conducted in the room, it is clear from the authorities that a partnership would not thereby be created. The fact that deductions are to be made from the net profits to an amount equal to the sum to be paid as rent would make no difference. The other clauses in the agreement referred to, and which we are not at liberty to disregard, indicate, in our judgment, that something more than a mere lease of the bar and billiard room was contemplated by the parties in reference to the business carried on in the room. The "bar and bar fixtures and billiard-tables and their equipments" were to be paid for and owned equally by both parties. If the terms "bar and bar fixtures and billiard-tables and their equipments" cannot be held to embrace the entire stock, including the liquors and wines, engaged in the business, they do include a portion of the capital stock ⁶⁵² employed. The net profits arising from the billiard-tables are to be considered under the agreement in ascertaining the additional sum to be paid to Webster, and bar fixtures are customary equipments for the conduct of a saloon business. Webster, as is clearly shown by the agreement, was to be half owner in such equipments as well as the billiard-tables, and it has been uniformly held that where parties have a community of interest in the capital employed, and also a community of interest in the profits, they are partners as

to third parties. The proof shows that Webster in person bought the billiard-tables for the bar business conducted by E. Rigney & Co., at the same time stating to the seller that he was a partner in the business. But in addition to the clause that Webster was to be an equal owner of the "bar and bar fixtures and billiard-tables and their equipments," other provisions indicate, it seems to us, a joint interest by Webster and Rigney in the bar business. There were to be no net profits until Rigney received as compensation for his services, and for the use of money advanced by him to pay for the bar and bar fixtures and to carry on the business, a sum equal to the rent paid to Webster. This means the fixed sum of two hundred and eight dollars and thirty-three cents per month which Webster was to receive. This implies that Rigney was to receive out of the net profits compensation for his services and for the use of money advanced by him to pay for the bar and bar fixtures and to carry on the business a sum equal to the sum to be paid to Webster as rent. The bar and bar fixtures, billiard-tables and their equipments were beyond question the joint property of both parties, and an agreement that Rigney was to be remunerated out of the net profits to the extent of two hundred and eight dollars and thirty-three cents per month for money advanced by him to pay ⁶⁵³ for the bar and bar fixtures and to carry on the business, implies that he has expended more than his share in paying for the bar, and bar fixtures, and to carry on the business. The terms "money advanced by him to pay for the bar and bar fixtures and to carry on the business" naturally imply that such was the case. The fact that compensation for Rigney's services was also provided for out of the net profits arising from property in which Webster unquestionably had a joint interest tends to strengthen the view that both parties were interested in the bar business as joint owners.

While the rule is clear that a written contract free from ambiguity cannot be varied by parol testimony, yet, if the language employed leaves the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect. The weight of the testimony in the present case is to the effect that both Webster and Rigney considered themselves as partners under the instrument in question.

In our judgment the written agreement discloses a part-

nership transaction in which both parties had a community of interest in the capital stock employed in business, and also a community of interest in the profits resulting therefrom; and this being the case they were partners as to third persons, and liable as such. The fact that the real transaction is sought to be concealed under the guise of a lease, as is apparent, cannot change the legal effect of the agreement, and is unimportant in arriving at the real intent of the parties as expressed in the entire instrument.

The conclusion we have reached is, that the judgment appealed from should be affirmed, and it will be so ordered.

PARTNERSHIP—LIABILITY OF ONE HELD OUT AS A PARTNER.—This question is fully discussed in the extended note to *Hahlo v. Mayer*, 22 Am. St. Rep. 757; but see, also, the note to *Fletcher v. Pullen*, 14 Am. St. Rep. 361.

PARTNERSHIP—WHAT CONSTITUTES.—A partnership is the contract relation subsisting between persons who have combined their property, labor, and skill in an enterprise or business as principals for the purpose of joint profit: *Spaulding v. Stubbings*, 86 Wis. 255; 39 Am. St. Rep. 888; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97, and note, with the cases collected.

PARTNERSHIP EXISTENCE, WHEN QUESTION OF LAW.—Where the terms of an agreement and the facts are all admitted, whether or not a partnership existed is a question of law: *Morgan v. Farrel*, 58 Conn. 413; 18 Am. St. Rep. 282, and note; but whether the existence of certain facts constitutes a partnership often depends upon the intention of the parties as between themselves, and evidence of such intent should be received when any doubt exists in order to ascertain the rule applicable to third persons: *Macy v. Combs*, 15 Ind. 469; 77 Am. Dec 103, and note.

In the case of *Dubos v. Jones*, 34 Fla. 539, the question was presented whether the following agreement constituted the parties partners as to third persons:

"THIS AGREEMENT entered into this 21st day of September, A. D. 1885, by and between Robert H. Jones, and Daniel Bowen, doing business as firm of Jones & Bowen, of county of Duval, and state of Florida, of first part, and M. L. Hoover, of the same state and county, of the second part:

"*Witnesseth*: That the parties of the first part agree to sell and deliver to the party of the second part such groceries and goods usually kept in a grocery store as may be agreed on between the parties from time to time to be necessary to keep up and conduct the business carried on in the store of the party of the second part on lot ten (10) in block two (2) in South Jacksonville, Duval county, state of Florida, on the following terms and conditions, to wit: 1. That said goods are to be sold by the party of the first part to the party of the second part for the lowest wholesale market price, and one-half of the profits made on sale of said goods by the party of the second part in the manner hereinafter stated, said half of the profits being paid to parties of first part in consideration of the time extended party of second part in payment for said goods, and of time extended in payment of debts now due parties of first by parties of second part.

"2. That the mortgage of even date herewith from the party of the second part to the parties of the first part shall include as a lien thereon the

said goods as agreed herein to be sold, and shall secure the said indebtedness due parties of first part herein mentioned.

"3. That the parties of the first part may place a person in said store of party of second part, who shall have the control and management of the books and business carried on by party of second part, and no debt shall be created in said business except on the consent of the parties of the first part.

"4. That the party of the second part shall be entitled to draw out of said business fifty dollars per month for his services in conducting the business of selling the said goods so placed in said store, and he shall give his entire time and attention to said business in consideration of said sum of fifty dollars per month, and the profits of said business to accrue to him as herein provided.

"5. That the proceeds of sale of all goods in said business shall be carefully kept and paid over each week to parties of first part on the debts now due them, and that hereafter may become due them, from the party of the second part for goods sold him as aforesaid, and on the other debts of party of the second part for goods in his said business.

"6. That at the end of two years the party of the second part shall be entitled to draw out or be paid one-half the profits of said business, if at that time all debts due parties of first part and all other debts of said business are then paid, and the remaining one-half of said profits shall be paid to parties of first part, as part of purchase money of the goods sold to party of second part before that time aforesaid.

"7. That the parties of the first part hereto shall not be liable for any debts heretofore created in said business of party of second part by him, or by Hoover and Lewis, nor hereafter created by said party of the second part, their only connection with this business being to furnish the goods to party of the second part on the terms herein expressed.

"8. That at any time when the parties of the first part have been paid their said claims due from party of the second part as herein stipulated, it shall be at the option of either of the parties hereto to treat and regard this agreement as no longer binding or of any effect; and, should the parties of first part find that the said business is not paying a profit above mentioned, it shall be at their option to withdraw from this agreement, and to cease to sell goods to party of the second part on the terms herein specified. And that, unless otherwise mutually agreed upon hereafter by the parties hereto, it shall not be binding on the parties of first part to sell more than two thousand four hundred dollars worth of goods under this agreement.

"9. That party of second part will renew lease of store at the end of one year according to the terms of his lease for same time from E. W. Gillen, if so requested to do by parties of first part. The salary of person placed in charge of business under paragraph 3 herein shall be paid out of receipts of business herein referred to."

In construing this agreement the court said: "We do not think the agreement constituted these parties partners *inter sese*. It provides, it is true, for a division between them of the profits of the business; and the law at one time in England, and in some of the American courts, treated such sharing of profits as the true test that established a partnership; particularly so as to third persons (*Waugh v. Carver*, 2 H. Black. 235), but this doctrine has become entirely obsolete, and is no longer law either in England or in this country: *Cox v. Hickman*, 8 H. L. Cas. 268; *Denny v. Cabot*, 6 Met. 82; *Parchen v. Anderson*, 5 Mont. 438; 51 Am. Rep. 65; *Culley v.*

Edwards, 44 Ark. 423; 51 Am. Rep. 614; *Eastman v. Clark*, 53 N. H. 276; 16 Am. Rep. 192; *Boston etc. Smelting Co. v. Smith*, 13 R. I. 27; 43 Am. Rep. 3; *Beecher v. Bush*, 45 Mich. 188; 40 Am. Rep. 465; *Meehan v. Valentine*, 145 U. S. 611; *Plunkett v. Dillon*, 4 Del. Ch. 198; *Greend v. Kummel*, 41 La. Ann. 65; *Ex parte Tennant, In re Howard*, L. R. 6 Ch. Div. 303; *Mollwo v. Court of Wards*, L. R. 4 P. C. App. Cas. 419; *Polk v. Buchanan*, 5 Sneed, 721. This agreement upon its face, and in express terms, repudiates the idea of a partnership between the parties *inter sese*, and shows clearly that the status thereby between Jones & Bowen on the one hand and Hoover on the other is that merely of debtor and creditor. . . . The whole agreement, in all of its provisions, shows clearly that Hoover was already the debtor of Jones & Bowen, and that he was to continue to be such debtor, and in a larger sum; and that the instrument was designed to secure Jones & Bowen in the payment of that indebtedness. The law is now well settled that, where a person loans or advances money or goods to another to be invested in some business or enterprise, the lender to share in the profits as or in lieu of interest on, or in repayment of, such loan or advance, does not constitute a partnership; neither will it constitute a partnership as to third persons unless the acts of the parties in furtherance of the agreement between themselves amount to such a holding of themselves out as partners as that third persons are misled into a reasonable belief that a partnership exists in fact. To constitute a loan the money advanced must be returnable in any event. It is not a loan if repayment is contingent upon the profits, for in such case it is made, not upon the personal responsibility of the borrower, but upon the security of the business. Neither must the transaction be a mere device to obtain the benefits of a partnership without incurring its responsibilities, for in such case, whatever else the parties may call it, it will be construed to be a partnership: Authorities *supra*; 17 Am. & Eng. Ency. of Law, 850, et seq., and citations.

“The agreement under consideration provides, as before stated, for the repayment, in any event, by Hoover of the advancements made to him by Jones & Bowen, and we do not think it subject to the charge of being a mere subterfuge to secure the benefits of a partnership minus its responsibilities. The conclusion reached by the referee, to the effect that this agreement, within and of itself, did not constitute Hoover, Jones & Bowen partners *inter sese*, or as to third persons, we think was correct. Parties however, who cannot be regarded as partners as between themselves, may, nevertheless, under certain circumstances, growing out of their acts, declarations, and dealings, be regarded as such as to third persons. Thus, a person holding himself out as a partner in a firm, or permitting himself to be so held out, will be held liable as such as to third parties, whatever may have been his actual relations with the firm or its members. The doctrine now in the ascendancy, however, is that one not a partner in fact cannot be held liable to third persons on the ground of having been held out as such, except upon the principle that where third persons have been misled by such holding out, he is equitably estopped from denying that he is a partner, and consequently he is now held liable, as a general rule, only to such persons as have been misled by or who have acted upon such holding out; or, as it is expressed by Justice Gray, in *Thompson v. First National Bank of Toledo*, 111 U. S. 529: ‘A person who is not in fact a partner, who has no interest in the business of the partnership, and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon

contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding. In such a case the only ground of charging him as a partner is, that, by his conduct in holding himself out as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership.' The same judge says further in the same case that 'there may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect': 17 Am. & Eng. Ency. of Law, 879-881, and citations.

"It seems to be well settled also that the question whether the plaintiff was induced to change his position or extend credit by acts or declarations done or made by the defendant or his authority is, as in other cases of estoppel *in pais*, a question of fact for the jury, and not of law for the court: *Thompson v. First National Bank of Toledo*, 111 U. S. 529; 17 Am. & Eng. Ency. of Law, 882; 1 Lindley on Partnership, sec. 53; *Woods v. Duke of Argyle*, 6 Man. & G. 928; *Lake v. Duke of Argyle*, 6 Q. B. 477.

"We have already seen that the agreement between the firm of Jones & Bowen on the one hand and Hoover on the other did not, in and of itself, constitute them partners *inter sese* or as to third persons, but that its provisions, if carried out, involved the performance of such acts by the defendants as would tend to constitute such a holding of themselves out as partners as that third persons might readily be misled into the belief that they were partners in fact, and upon the strength thereof might extend credit to them as such, in which event the law would hold them liable as such, and they would be estopped to deny it. The feature of the agreement tending most strongly to this result is the provision for Jones & Bowen placing their agent in charge and control of the books and business carried on by Hoover, and taking charge of the funds arising from the sale of goods, and paying them out to the creditors of Hoover, and their control over the incurrence of debts in the business of Hoover. All of these things tend strongly to mislead third persons into the belief that they were responsible for the business and its liabilities; but, as before shown, in order for them to be liable to third persons as partners, when they are not such in fact, in consequence of a holding out as such, it is incumbent upon the party seeking to establish the liability to show that he has been misled by the holding out, and that he has been induced thereby to extend credit upon the belief, created by the acts or declarations of the defendants, or, by their permission, through the acts or declarations of others, that they were partners."

In conclusion the court said that the plaintiff in this case "has failed entirely in his proof to show that any declarations or acts upon the part of Jones & Bowen have so misled him into a belief that they were partners of Hoover as to induce him to extend credit to the latter, and that would operate as an estoppel upon them to gainsay their liability as partners."

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

NORRIS v. ILE.

[152 ILLINOIS, 190.]

- LIS PENDENS.**—A purchaser of lands *pendente lite* takes his title therein subject to the final decree in the pending suit.
- RES JUDICATA.**—A DECREE IN A SUIT FORECLOSING A MORTGAGE, whether right or wrong, is binding on the parties to the suit and those purchasing from them, or either of them, during its pendency, and it cannot be attacked collaterally if the court had jurisdiction of the parties and of the subject matter.
- LIS PENDENS IS NO MORE THAN THE ADOPTION OF THE RULE IN REAL ACTIONS** at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action overreaches such alienation.
- LIS PENDENS BEGINS FROM THE SERVICE OF THE SUBPOENA** after the filing of the bill. A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing.
- LIS PENDENS.**—TO THE EXISTENCE OF A VALID LIS PENDENS three things are necessary: 1. The property must be of such a character as to be subject to the rule; 2. The court must have jurisdiction both of the person and of the *res*; 3. The *res* or property involved must be sufficiently described in the pleadings.
- LIS PENDENS.**—THE DESCRIPTION OF THE PROPERTY IN THE PLEADINGS is sufficient if any one reading them must be able to learn thereby what property is intended to be made the subject of the litigation. The legal maxim that that is certain which can be made certain applies to the question whether property is sufficiently described to create *lis pendens*.
- LIS PENDENS—AMENDMENTS.**—If a bill originally so defective in its description of property, or, in the language of the prayer, as not to create *lis pendens*, is afterward cured by amendment in these particulars the *lis pendens* will commence at the time of filing the amendment, if the defendant has been served with process.
- LIS PENDENS.**—DELAY OR LAPSE OF TIME IN THE PROSECUTION OF A SUIT will not create any estoppel against the right to enforce the rules of *lis*

pendens, unless the complainant has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned.

LIS PENDENS.—THE FILING OF AN AMENDMENT does not prevent *lis pendens* operating as under the original bill if such amendment does not set up any new equity, nor bring forward a new claim or distinct ground of relief.

LIS PENDENS.—A PURCHASER PENDENTE LITE NEED NOT BE MADE A PARTY to the suit nor otherwise noticed by the litigating parties.

STATUTE OF LIMITATIONS.—While the relation of mortgagor and mortgagee continues, neither party in possession can interpose the statute of limitations as a defense against the other, and neither the mortgagor nor his grantee can defeat the mortgagee's right of action by retaining possession and paying taxes.

STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A PURCHASER PENDENTE LITE. He will not be regarded as holding adversely to the parties to a suit during the litigation.

STATUTE OF LIMITATIONS.—NOT UNTIL THE PURCHASER AT A FORECLOSURE SALE IS ENTITLED TO A DEED can the mortgagor or his grantee assert an adverse possession.

H. Tompkins, George M. Norris, R. D. Adams, and C. S. Conger, for the appellant.

Creighton & Kramer, R. P. Hanna, and E. Beecher, for the appellee.

193 MAGRUDER, J. This is an action of ejectment, brought by appellant against appellee for the recovery of northwest quarter of section 24, township 1 south, range 9 east, of the third parallel meridian, in Wayne county. The case was tried by agreement before the court without **193** a jury, the finding and judgment were for the defendant, and the present appeal is prosecuted from such judgment.

The land involved was originally a part of the swamp lands granted to the state by act of Congress, approved September 28, 1850 (2 Starr and Curtis' Annotated Statutes, 2379), and granted by the state to the several counties in which they were located by act of the legislature, approved January 22, 1852: 1 Adams and Durham's Real Estate Statutes and Decisions of Illinois, 898. It is conceded that the county of Wayne had good title to the swamp lands therein under said acts; and both parties deraign their title from said county. Appellee claims title through a foreclosure sale in a proceeding to foreclose a mortgage executed by said county and conveying certain swamp lands, including the quarter section above mentioned. Appellant claims title through a deed of the same swamp lands, executed by said county after the execution of said mortgage, and after the filing of the bill to foreclose the same.

On April 20, 1859, the county of Wayne executed to Isaac Seymour, trustee, of New York, a mortgage upon one hundred and three thousand eight hundred and eighteen acres of its swamp lands (less three thousand eight hundred acres pre-empted) to secure the payment of construction bonds of the Mount Vernon Railroad Company, to the amount of eight hundred thousand dollars, and at the same time also executed to said Seymour, as trustee, a trust deed conveying said lands to him upon certain trusts relating to the construction of said road and the raising of funds therefor, and containing recitals similar to those in the mortgage, and equally in the interests of the holders of said bonds. Said mortgage and trust deed were recorded in the recorder's office of Wayne county on May 3, 1859. On the same day the Mount Vernon Railroad Company executed a mortgage upon its contemplated railroad, its appurtenances, franchises, and all its property and effects, present and prospective, to the said Seymour, as trustee, for the purpose of securing said bonds and for the benefit ¹⁹⁴ of the holders thereof. A fuller description of these instruments, and of the proceedings leading up to their execution, will be found in *Kenicott v. Supervisors*, 16 Wall. 452, and *Scates v. King*, 110 Ill. 456.

On March 7, 1865, John W. Kenicott and others, holders of some of said bonds, filed a bill in the circuit court of the United States for the southern district of Illinois against the Mount Vernon Railroad Company and the county of Wayne to foreclose said mortgages and trust deed, alleging, among other things, the death of Seymour, the trustee, and that by reason thereof the trust had become incapable of execution except by the aid of the court, and praying for an accounting and for such other relief as might be just and equitable. On March 29, 1866, the complainants in said foreclosure suit filed an amended bill, setting up more specifically the facts in relation to the organization of said company, and praying that a trustee be appointed in the place of Seymour to execute the trust under the direction of the court, or for a decree foreclosing said mortgages or deed of trust. On October 1, 1866, complainants filed a second amended bill, setting forth said mortgages, and the provisions of the charter of said railroad company, and the action of the county court in calling and holding an election to take the vote of the people upon the question of aiding in the construction of a railroad by the appropriation of the swamp lands to that purpose, and in

ordering the execution of said mortgages; and praying for a foreclosure of said mortgages and trust deed. Summons, issued upon the original bill, was served upon the county on March 11, 1865. The railroad company was also served, and default was entered against it on June 1, 1868, and a decree of sale entered against it on June 18, 1868, under which the company's road, franchises, and effects were sold by the master to the company, and subsequently conveyed to it by a master's deed: *Scates v. King*, 110 Ill. 456.

¹⁹⁵ On January 17, 1870, to which date the cause had been continued on the docket as to the county of Wayne, the said complainants filed a third amended bill, containing the same allegations and prayer as the former bill, and setting up, in addition to such allegations, that on November 19, 1858, the county of Wayne had made a written contract with Vanduzer, Smith & Co. for the construction of a railroad from Mount Vernon, in Jefferson county, to the eastern boundary of Wayne county, thus running across the entire width of the latter county; and that Vanduzer, Smith & Co. thereafter assigned their interest in said contract to the Mount Vernon Railroad Company. The contract thus assigned is more fully described in *Kenicott v. Supervisors*, 16 Wall. 452, and *Scates v. King*, 110 Ill. 456. This bill was answered by the county upon its merits. A hearing was had on January 2, 1871, and a decree dismissing the bill was entered by said circuit court of the United States. This decree, upon appeal to the supreme court of the United States, was reversed and the cause was remanded to the circuit court, as will be seen by reference to *Kenicott v. Supervisors*, 16 Wall. 452. On June 25, 1874, a decree was entered by said circuit court foreclosing the mortgage and trust deed executed by the county of Wayne, and directing a sale of said lands by the master, and ordering that said county and all persons claiming under it as purchasers or grantees *pendente lite* "since the commencement of this suit" be forever barred and foreclosed from all equity of redemption in said mortgaged premises, unless redeemed according to the laws of Illinois, and that the purchaser at the master's sale be let into possession, and that said county or railroad company, or purchaser *pendente lite* under either of them, who might be in possession, and any person coming into possession, since the commencement of the suit, should surrender possession on the production of the master's deed.

196 The decree of foreclosure and sale thus entered by the circuit court was taken by appeal to the supreme court of the United States, and was there affirmed, as will be seen by reference to the case of *Supervisors v. Kenicott*, 94 U. S. 498. Thereafter, on September 18, 1877, a sale was made by the master in chancery of the circuit court under said decree to the trustees of the complainants, and a certificate of purchase was issued to them, and by them assigned to N. M. Broadwell, to whom a master's deed of said lands was executed on May 5, 1879. By a regular chain of conveyances the title thus acquired by Broadwell has passed to and become vested in the appellee herein, Charles Ile.

On October 13, 1868, the county clerk of Wayne county, in pursuance of an order entered on October 5, 1868, executed quitclaim deeds to the Illinois Southeastern Railway Company, conveying all the lands involved in the Kenicott suit, and other lands, which deeds, by the terms of a contract between said county and said railway company, were held in escrow by one Alexander, as trustee, until the fulfillment of certain conditions, and were not delivered until July 1, 1870 (said conditions having been performed on April 14 and May 1, 1870), and were not recorded until June 15, 1872. The Illinois Southeastern Railway Company was, in December, 1869, consolidated with the Pana, Springfield, and Northwestern Company, the name of the consolidated company being the Springfield and Illinois Southeastern Railway Company. By deed dated July 29, 1871, and recorded June 15, 1872, the Illinois Southeastern Railway Company conveyed the lands in question to the Springfield and Illinois Southeastern Railway Company; and the latter company, by deed dated July 10, 1871, and recorded May 31, 1872, conveyed said lands to C. A. Beecher. By regular conveyances whatever title was thus acquired by C. A. Beecher has passed to and becomes vested in the appellant herein, George W. Norris.

197 As the Illinois Southeastern Railway Company did not obtain its deed from Wayne county until 1868 it was, of course, bound to take notice of the mortgage made by the county to Seymour, as trustee, which had been executed and recorded as early as 1859. The deed of 1868 was subject to the mortgage of 1859, and the holders of the bonds, secured by the mortgage, were entitled to priority, in the enforcement

of their security, over the subsequent purchaser of the equity of redemption.

It is shown by the proof, and is not denied by appellant, that the grantee in the deed of 1868 had actual, as well as constructive, notice of the mortgage of 1859. But it is claimed that such notice cannot have the effect of postponing the rights of those claiming under the deed to the rights of those claiming under the mortgage, because of the alleged void character of the mortgage. It is urged that the county court had no power to execute the mortgage; that, consequently, nothing passed by it; and that the grantee in the deed of 1868, having notice of such want of power, was authorized to disregard the mortgage and accept a conveyance of the land as though no such mortgage existed. In support of this position reference is made to the case of *Scates v. King*, 110 Ill. 456. It was held in that case that the trust deed and mortgage made by the county of Wayne in 1859 were void for want of power to execute them. There the deeds to King were executed by the county before the bill to foreclose the mortgage to Seymour was filed, and King was not made a party to the foreclosure proceeding. Accordingly, his rights were not cut off by the foreclosure decree. Here, however, the railway company, under which appellant holds his title, obtained its deed after the bill to foreclose was filed and after the service of process therein; and the company was, therefore, a purchaser *pendente lite*, and took its interest in the lands, subject to the foreclosure decree, as will hereafter appear.

¹⁹⁸ We concur in the doctrine announced in *Scates v. King*, 110 Ill. 456, as being in harmony with the decisions of this court, and would follow that case as a precedent rather than the case of *Kenicott v. Supervisors*, 16 Wall. 452, were it not that the decision in the latter case has conclusively settled the title to the property involved in the case at bar as between appellant and appellee. In *Kenicott v. Supervisors*, 16 Wall. 452, the supreme court of the United States held that the county of Wayne had the power to execute the trust deed and mortgage to Seymour and that the same were valid, and that Kenicott and the other holders of the bonds thereby secured were entitled to a decree foreclosing the same. The same conclusion was announced in the subsequent case of *Supervisors v. Kenicott*, 94 U. S. 498. The decision thus made by the federal court, whether right or wrong, is bind-

ing upon the parties to the foreclosure suit and those purchasing during its pendency. As to them, it is *res judicata*, and cannot be attacked collaterally. The circuit court of the United States had jurisdiction over the subject matter and the parties in the foreclosure suit; and, where it is made to appear that a court has such jurisdiction, the judgment or decree pronounced by it must be held to be conclusive and binding upon the parties thereto and their privies, although the court may have proceeded irregularly, or erred in its application of the law in the case before it: *Maloney v. Dewey*, 127 Ill. 395; 11 Am. St. Rep. 131. In *Scates v. King*, 110 Ill. 456, we said: "It is claimed by counsel for appellant that the decree of foreclosure in the United States court finally settled as *res judicata* the fact of making the mortgage, the power and authority of the county to make it, and the liability of the county to pay the debt thereby secured. . . . It is conceded, however, that, so far as the county is concerned, the above facts are conclusively settled by the decree in that case."

But appellant contends that the grantee in the deed of 1868 was not a purchaser *pendente lite* in such sense, ¹⁹⁹ that its rights can be controlled by the rules applicable to purchases made during the pendency of litigation.

Chancellor Kent has said, that *lis pendens* is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ the judgment in the real action will overreach such alienation: *Murray v. Ballou*, 1 Johns. Ch. 566. It was one of the ordinances of Lord Bacon, that "no decree bindeth any that come in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party either by bill or order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color or allowance or privity of the court, there the decree bindeth": *Murray v. Ballou*, 1 Johns. Ch. 566. Whether the object of *lis pendens* be constructive notice, or to hold the subject of the suit, or *res*, within the power of the court so as to enable the court to give effect to its judgment or decree, the decision of the court will be binding not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit: 2 Pomeroy's Equity Jurisprudence, sec. 632. The doctrine of *lis pendens* is founded upon public convenience and necessity: *Durand v. Lord*, 115 Ill. 610.

The *lis pendens* begins from the service of the summons or subpoena after the filing of the bill: *Grant v. Bennett*, 96 Ill. 513. A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing. If this were not the rule parties might, by transferring their interests during the pendency of the suit, defeat its whole purpose, and make the litigation endless. A purchaser *pendente lite* from a mortgagor is, to all intents and purposes, a party to the decree of foreclosure, because the same proceedings can be had against him which can be taken against the mortgagor. He who purchases property during the pendency of the suit is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset: ²⁰⁰ *Loomis v. Riley*, 24 Ill. 307; *Jackson v. Warren*, 32 Ill. 331; *Dickson v. Todd*, 43 Ill. 504; 1 Story's Equity Jurisprudence, sec. 406; *Tilton v. Co-field*, 93 U. S. 163.

An application of these principles to the facts of the present case will show that the Illinois Southeastern Railway Company, and those deraigning their title from that company, were as much bound by the decree of foreclosure in the Kenicott suit as though they had been parties thereto. As the bill was filed on March 7, 1865, and summons was served upon Wayne county on March 11, 1865, the railway company, taking a deed from the county in October, 1868, was certainly a purchaser *pendente lite*. Is there any thing in the pleadings, or amendments, or mode of prosecution in the foreclosure suit which relieves the deed of 1868 from the operation of the general rules as to *lis pendens*?

It is claimed that the original bill filed on March 7, 1865, was too indefinite in its allegations and in the language of its prayer to warrant a decree of foreclosure. In addition to what has already been stated in relation to the contents and prayer of said bill it sets up the act of February 5, 1855, incorporating the Mount Vernon Railroad Company for building a railroad, etc., alleges the ownership of the swamp lands by Wayne county, and that the county was authorized by section 9 of said act to aid in the construction of said railroad under the provisions in sections 7, 8, and 9 of said act, that the county court of said county on September 28, 1855, ordered an election to be held on November 5, 1855, under said section 8, to decide whether said lands should be mortgaged to aid in such construction, that said election resulted in

favor of appropriating the swamp lands for such purpose, that, in pursuance of such vote and of an order entered on April 20, 1859, said county executed two indentures on that day to Isaac Seymour, trustee, conveying said swamp lands in trust for the uses and purposes therein described, copies of which were filed as ²⁰¹ exhibits "A" and "B," and made a part of the bill; the bill then gives a list of the lands conveyed, and further alleges that complainants were holders of some of the bonds secured by said indentures, that the interest on the same had not been paid by the county of Wayne or the railroad company, and that the said mortgages and trust deed had become forfeited by reason of such default, etc. The objections which counsel make to the bill, as we understand them, are, that, while the trust deed made by the county was filed as an exhibit, the mortgage executed by it was not filed as an exhibit, and that there was not a specific prayer for foreclosure.

We do not deem it necessary to discuss the sufficiency or insufficiency of the original bill, because, even if it was so defective in the respects indicated as not to be effective as a *lis pendens*, the amended bills filed on March 29, 1866, and October 1, 1866, were free from the defects complained of. These amended bills of 1866, particularly the second one, not only described more fully all the proceedings referred to in the original bill, but they set forth in detail, and at large, the provisions of the mortgage made by the county to Seymour on April 20, 1859, describing the lands thereby conveyed, and stating that said mortgage had been recorded in the recorder's office of Wayne county on a certain day and in a certain book, and on certain pages of that book. The prayer contained all that was in the prayer of the original bill, and, in addition thereto, prayed either for the appointment of a new trustee in the place of Seymour, and that he be directed to execute the trust, or, in the alternative, as follows: "If it shall appear that your orators are entitled to a decree foreclosing said mortgages or deed of trust, and are entitled to relief by a direct order of the sale of said lands, or any part thereof, that said decree may be rendered, and for such other and further relief as to your honors may seem equitable and just."

²⁰² Three facts are necessary to the existence of a valid *lis pendens*: 1. The property involved must be of such a character as to be subject to the rule; 2. The court must have

jurisdiction both of the person and of the *res*; 3. The *res*, or property involved, must be sufficiently described in the pleadings: Bennett on Lis Pendens, 153. We think that all these requirements are met in the amended bills of 1866. The legal maxim, that that is certain which can be made certain, applies to the question whether property is sufficiently described to create *lis pendens*. The description of the property may be such that, by reference and upon inquiry, it may be ascertained. It must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril; and any one reading the bill must be able to learn thereby what property is intended to be made the subject of litigation: *Miller v. Sherry*, 2 Wall. 237; *Green v. Slayter*, 4 Johns. Ch. 38; *Allen v. Poole*, 54 Miss. 323; 13 Am. & Eng. Ency. of Law, 877.

Where a bill, originally so defective in the description of the property involved or in the language of its prayer as not to create a *lis pendens*, is subsequently cured by amendment in these particulars, the *lis pendens* will commence at the time of filing the amendment, where the defendant has been served with process: 13 Am. & Eng. Ency. of Law, 886, and cases in note. In the case at bar the purchase *pendente lite* was made after the amendments of 1866, and after service of summons upon the county.

It is further contended on behalf of appellant that *lis pendens* ended in June, 1868, when a decree of sale was entered upon the mortgage executed by the Mount Vernon Railroad Company. The bill was filed to foreclose three instruments, the mortgage made by the railroad company, the mortgage made by the county, and the trust deed made by the county. All these instruments were parts of one general scheme for the raising ²⁰³ of funds to build a railroad through the county: *Scates v. King*, 110 Ill. 456; but the mortgage executed by the railroad company was intended more particularly to cover the right of way, franchises, and rolling stock. If the court erred in rendering two decrees of foreclosure instead of one it was an error for which the foreclosure proceeding cannot be collaterally attacked. After the decree or order of 1868 the cause was regularly continued on the docket until the final decree was entered under which the land was sold. It has been said that, in order to prevent a suspension of *lis pendens*, there must be a "full" or continuous prosecution of the suit. But the rule in reference to a continuous prosecution simply requires that there shall be no such neglect in

the prosecution as cannot be explained and appears to be inexcusable. Mere lapse of time does not indicate such negligence. If the cause finally goes to decree or judgment it will be presumed, in the absence of any showing that there has been a negligent intermission of the prosecution, that there has been a binding *lis pendens*, and that intervenors *pendente lite* are bound by the decree or judgment. As a general rule there will be no estoppel against the right to enforce the *lis pendens*, unless the plaintiff or complainant in the suit has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned: Bennett on Lis Pendens, 173, 180; 13 Am. & Eng. Ency. of Law, 889-891. In the present case we find nothing in the record to show that there was any such negligence in the prosecution of the foreclosure suit as to overcome the presumption of a binding *lis pendens*.

It is still further insisted by the appellant that, by reason of the amended bill filed on January 17, 1870, a new *lis pendens* was created from that time, which could not affect the interests acquired by the grantee in the previous deed of 1868. There are cases where the *lis pendens* will begin with the filing of the amendment, and will ²⁰⁴ not relate back to the commencement of the action, so as to affect intervening rights. This, however, is only true where the amendment sets up a new equity, or where the party making the amendment brings forward a new claim, or a different and distinct ground of relief, not before asserted: Bennett on Lis Pendens, 97, 160; *Tilton v. Cofield*, 93 U. S. 163; *Bank v. Sherman*, 101 U. S. 403; *Stoddard v. Myers*, 8 Ohio, 203; *Gibbon v. Dougherty*, 10 Ohio St. 365; *S. C. Hall Lumber Co. v. Gustin*, 54 Mich. 624; 1 Freeman on Judgments, sec. 199; *Bradley v. Luce*, 99 Ill. 234; *Stone v. Connelly*, 1 Met. (Ky.) 652; 71 Am. Dec. 499; *Worthman v. Boyd*, 66 Tex. 401. Purchasers *pendente lite* must take notice of every thing averred in the pleadings pertinent to the issue or to the relief sought: *Center v. P. & M. Bank*, 22 Ala. 757; *Allen v. Poole*, 54 Miss. 323; *Worthman v. Boyd*, 66 Tex. 401; 13 Am. & Eng. Ency. of Law, 886.

The only new matter to which counsel refer as being set up in the amended bill of 1870 is the contract between the county and Vanduzer, Smith & Co. to build a railroad through the county, etc: *Kenicott v. Supervisors*, 16 Wall. 452; *Scates v. King*, 110 Ill. 456. No relief was asked under this contract.

No new cause of action was set up different from that stated in the bills of 1865 and 1866. The contract was simply evidence of the power of the county to execute the mortgage and trust deed. The bills already filed had alleged the execution of the mortgage by the county, in pursuance of an order of the county court, for the purpose of aiding in the construction of a railroad, and had asked for a foreclosure of the mortgage. Such, also, was the scope and character and prayer of the bill of 1870. The mere pleading of a matter of evidence did not change the essential features of the case made by the bills already filed. We do not think that there was any thing in the amendment of 1870 which prevents the *lis pendens* from relating back to the filing of the amended bills in 1866, and subjecting the interests acquired by the deed of 1868 to the operation of the foreclosure decree.

205 Counsel for appellant urge upon our attention various reasons why the complainants in the foreclosure suit were chargeable with notice of the execution of the deed of 1868, and of the rights of those holding under it. Where there is a purchase *pendente lite*, not only is the purchaser bound by the decree that may be made against the person from whom he derives title, but "the litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the suit": 1 Story's Equity Jurisprudence, sec. 406. He is not a necessary party, because his vendor or grantor continues as the representative of his interests, and the plaintiff or complainant may ignore his purchase and proceed to final decree against the original parties: *Edwards v. Norton*, 55 Tex. 405; *Smith v. Hodsdon*, 78 Me. 180; *Carter v. Mills*, 30 Mo. 437; *Steele v. Taylor*, 1 Minn. 274; 13 Am. & Eng. Ency. of Law, 900, 901. It is, therefore, immaterial whether the complainants in the foreclosure suit had notice of the deed of 1868 or not.

Counsel for appellant rely upon payment of taxes and possession for seven successive years under the deed of 1868 as color of title. This statute could not be invoked against the complainants in the foreclosure suit by the county of Wayne, or its grantee, during the pendency of the suit. While the relation of mortgagee and mortgagor continues, neither party in possession can interpose the statute of limitations as a defense against the other. The statute can only commence to run after that relation has been terminated in some of the modes known to the law: *Rockwell v. Servant*, 63 Ill. 424.

The mortgagor cannot defeat the mortgagee's right of action by retaining possession and paying taxes for seven successive years; and it is as much the duty of a grantee of the mortgagor, receiving his possession from the mortgagor, to pay the taxes upon the property as it is the duty of the mortgagor himself to do so. The limitation law of 1839 has no application to such a case: *Hagan v. Parsons*, ²⁰⁶ 67 Ill. 170; *Palmer v. Snell*, 111 Ill. 161. Nor does the statute of limitations run in favor of a purchaser *pendente lite*. Such a purchaser in possession of land so purchased will not be regarded as holding it adversely to the parties to the suit during the litigation: *Lynch v. Andrews*, 25 W. Va. 751. In the present case the sale under the decree of foreclosure was not made until September 18, 1877, and the time of redemption did not expire until December 18, 1878. Not until the latter date was the purchaser under the foreclosure decree entitled to a master's deed, nor until that date could the mortgagor or his grantee assert an adverse possession: *Emmons v. Moore*, 85 Ill. 304; *Lehman v. Whittington*, 8 Ill. App. 374. The proof does not show a payment of taxes for seven successive years after December 18, 1878, or after September 18, 1877, by the grantee in the deed of 1868, or by any of the parties holding under that deed. We cannot discover that appellant, or any of his grantors, have acquired title under the limitation law, which provides for possession and payment of taxes for seven successive years under color of title.

The considerations already presented dispose of the claim that title was acquired under the first section of the limitation law in regard to possession for twenty years. Whatever possession the grantee in the deed of 1868, or those holding thereunder, may have had during the period of ten years from 1868 to 1878, whether such possession is claimed under the seven years' limitation or under the twenty years' limitation, was not adverse to the mortgagees prosecuting the foreclosure suit against the county, but was subordinate to their rights. After deducting the time during which the foreclosure suit was pending there was no adverse possession for twenty years by appellant, or any of his grantors, near or remote. The proof does not show any such possession as meets the requirement of the statute in regard to twenty years' possession. Where the possession of land alone ²⁰⁷ is relied upon for any legal purpose, in the absence of paper title, it should be a *pedis possessio*, an actual occupancy of the premises in

question, and not a mere constructive possession: *Webb v. Sturtevant*, 1 Scam. 181; *Illinois Mut. Fire Ins. Co. v. Marselles Mfg. Co.*, 1 Gilm. 236; *Medley v. Elliott*, 62 Ill. 532; *City of Champaign v. McMurray*, 76 Ill. 353; *Schneider v. Botsch*, 90 Ill. 577. Under the first section of the limitation law, which provides that real actions for the recovery of land must be brought within twenty years, etc., no deed or paper title is necessary; it is sufficient to take possession under a claim of ownership: *Weber v. Anderson*, 73 Ill. 439; *Shaw v. Schoonover*, 130 Ill. 448.

The judgment of the circuit court is affirmed.

LIS PENDENS—RIGHTS OF PURCHASERS.—One who purchases of either party to a suit the subject of the litigation, after the court has acquired jurisdiction, is bound by the judgment or decree: *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848; *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760; *Cheever v. Minton*, 12 Col. 557; 13 Am. St. Rep. 258, and note; *Henderson v. Pickett*, 4 T. B. Mon. 54; 16 Am. Dec. 130; *Williams v. Kerr*, 113 N. C. 306.

LIS PENDENS—WHEN BEGINS.—Under the Kentucky statute an equitable *lis pendens* is acquired in a suit to subject specific property to the payment of a debt by filing a petition and serving summons: *Rothschild v. Kohn*, 93 Ky. 107; 40 Am. St. Rep. 184, and note with the cases collected. See, also, *Kellogg v. Fancher*, 23 Wis. 21; 99 Am. Dec. 96, and note.

LIS PENDENS—WHAT CONSTITUTES VALID.—To constitute a valid *lis pendens*, the property sought to be affected must be such that its title will be immediately affected by the judgment; the court must have jurisdiction both of the person and the property, and the property must be sufficiently described in the proceedings: *Leavell v. Poore*, 91 Ky. 321. To the same effect, see *Houston v. Timmerman*, 17 Or. 499; 11 Am. St. Rep. 848.

LIS PENDENS—DESCRIPTION OF PROPERTY.—SUFFICIENCY OF: See the note to *Newman v. Chapman*, 14 Am. Dec. 779.

LIS PENDENS—AMENDMENT OF COMPLAINT—EFFECT OF.—The effect of a notice of *lis pendens* is not ordinarily destroyed by an amendment to the complaint: *Brock v. Pearson*, 87 Cal. 581. An entirely new *lis pendens* is created by an amendment of the petition by which new matter is brought into the suit, and such *lis pendens* is not permitted to relate back to the commencement of the action so as to affect intervening rights: *Stone v. Connelly*, 1 Met. 652; 71 Am. Dec. 499. See, also, the note to *Pearson v. Keedy*, 43 Am. Dec. 164.

LIS PENDENS—EFFECT OF LACHES IN PROSECUTION OF SUIT.—The institution of suit by a creditor gives a specific lien upon the property which he seeks to subject to his judgment; but, to entitle him to the benefit of the rule, he must use something like reasonable diligence in the prosecution of the suit: *Watson v. Wilson*, 2 Dana, 406; 26 Am. Dec. 459, and note; *Trimble v. Boothby*, 14 Ohio, 109; 45 Am. Dec. 526, and note. The benefit of the rule relating to *lis pendens* may be lost by such long continued inaction as amounts to gross negligence in the party prosecuting to the prejudice of innocent persons: *Fox v. Reeder*, 28 Ohio St. 181; 22 Am. Rep. 370.

A purchaser *pendente lite* is not affected by a suit pending, unless it has been prosecuted with due diligence, if he buys in good faith, and without notice of the claims of the litigants: *Hayes v. Nourse*, 114 N. Y. 595; 11 Am. St. Rep. 700. In *Gosson v. Donaldson*, 18 B. Mon. 230; 68 Am. Dec. 723, it was held that the benefit of *lis pendens* is not lost by failure to prosecute a suit with even ordinary diligence, but it can only be lost by unusual and unreasonable negligence in its prosecution.

JUDGMENTS IN FORECLOSURE PROCEEDINGS AS RES JUDICATA: See *O'Brien v. Moffitt*, 133 Ind. 660; 36 Am. St. Rep. 566, and note; and *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379, and note.

FIRST NAT. BANK v. NORTHWESTERN NAT. BANK.

[152 ILLINOIS, 296.]

PRACTICE.—THE STATUTE AUTHORIZING PARTIES TO SUBMIT WRITTEN PROPOSITIONS OF LAW TO THE COURT to be accepted as law in the decision of the case does not contemplate that, under cloak of submitting such propositions, a litigant shall have the right to call upon the court to find in his favor on the special or particular facts involved in the evidence, but the court may be asked to rule that, as a matter of law, the judgment should be in favor of the party asking such ruling. To request such a ruling is equivalent to demurring to the evidence.

BANKING.—A CHECK PAYABLE TO ORDER is a bill of exchange payable to order on demand.

BANKING—FORGED CHECKS.—THE DRAWEE OF A BILL OF EXCHANGE OR OF A BANK CHECK is conclusively presumed to know the signature of the drawer, and if he accepts or pays in the usual course of business a bill or check whereon the signature of the drawer is a forgery, he and the person to whom payment is made are both estopped to afterward deny the genuineness of such signature.

AN ESTOPPEL MUST BE MUTUAL. It must bind both parties, and one who is not bound by it cannot take advantage of it.

BANKING—FORGED INDORSEMENTS.—The drawee of a check is bound to know the signature of his own customers, but is not bound to know any other signature thereon, and by accepting or paying a bill or check does not admit the genuineness of any indorsement of it.

BILLS OF EXCHANGE—FICTITIOUS PARTIES.—The fact that a check or bill of exchange is made payable to a person who does not own it, but is merely an officer or agent of the corporation or person entitled to its proceeds, does not constitute it a bill or check payable to a fictitious person, nor render it any the less forgery to indorse the name of the person designated therein as payee without authority so to do.

BANKING.—A BANK INDORSING AND COLLECTING A CHECK WARRANTS THE GENUINENESS OF ALL THE PRE-EXISTING INDORSEMENTS thereon, including the indorsement of the respective payees named in such check, and is answerable for moneys received by it if any of such indorsements are forgeries.

BANKING.—A BANK PAYING A CHECK ON A FORGED INDORSEMENT IS ENTITLED to recover the money so paid from the person receiving it,

on making demand within a reasonable time after the discovery of the forgery.

BILLS OF EXCHANGE AND CHECKS.—THE ACCEPTANCE OF A CHECK DOES NOT PROVE OR ADMIT THE GENUINENESS OF ANY SIGNATURE THEREON other than that of the drawer, and will not exonerate from liability a bank subsequently collecting such check or bill by virtue of a forged indorsement, though such indorsement was not made by it or with its knowledge or procurement.

Remy & Mann, for the appellant.

Charles M. Sturges, for the appellee.

300 **BAKER, J.** In this action of *assumpsit* brought by the Northwestern National Bank of Chicago against the First National Bank of Chicago, the issues were tried before the superior court of Cook county without a jury, and the court found the issues for the plaintiff, and assessed its damages at two thousand four hundred and fifty-four dollars, and rendered judgment therefor against the defendant. Upon an appeal to the appellate court for the first district the judgment was in all things affirmed, and thereupon the First National Bank of Chicago prosecuted this further appeal.

A preliminary question is raised by the appellee. It insists that all questions of fact are conclusively settled in its favor by the judgment of affirmance in the appellate court, and further, that no questions of law are so preserved in the record as that they can be reviewed in this forum.

At the trial appellant submitted to the court eight "written propositions," which it prayed should "be held as law in the decision of the case": Practice Act, sec. 41; 2 Starr and Curtis' Annotated Statutes, 1808. The court "held" propositions 1, 2, and 3, but "refused" to hold propositions 301 4, 5, 6, 7, and 8 to be law applicable in the decision of the case, and to the action of the court in refusing to hold said five last-mentioned propositions, and each of them, appellant then and there excepted.

In respect to propositions 4, 5, 6, and 7 it may well be said that they are not propositions of law, within the intent and meaning of section 41 of the Practice Act. They are, both in form and in substance, mere prayers or solicitations of appellant to the trial court to find particular facts for it, "under the law and the evidence." The statute does not contemplate that under the cloak of written propositions of law a party litigant shall have the right to call upon the court to find in his or its favor, *seriatim*, all the special or particular facts involved in

the evidence; and, *dehors* the statute, it is not a common-law function of a judge, in a common-law action, to make special findings of fact. The rule is, *ad quæstionem facti non respondent iudices*: Broom's Legal Maxims, 4th ed., 103; *Altham's case*, Coke, pt. 8, 155 a. In *Memory v. Niepert*, 131 Ill. 623, the case was tried by the court below without a jury, and this court held that a proposition there asked was properly refused, and for the reason that no question of law was thereby raised. And so in the case at bar the trial court could not properly have done otherwise than refuse to hold the propositions 4, 5, 6, and 7.

The trial court also declined to hold proposition 8 tendered by appellant, and marked the same "refused." That proposition reads as follows: "The court holds, as matter of law, that under the law and evidence the judgment in this case should be for defendant." There can be no question but that if the case had been on trial before a jury, and appellant had moved the court to instruct the jury that under the law and evidence, and as matter of law, the verdict and judgment in the case should be for the defendant, then such motion would have been regarded as a motion in the nature of a demurrer to the evidence, and as raising a question of law for the decision of the ³⁰² court. In *Bartelott v. International Bank*, 119 Ill. 259, it was held that motions to exclude the entire evidence from the jury, and motions to instruct the jury to find for the defendant, are in the nature of demurrers to evidence, and that they admit not only all that the testimony of the plaintiff proves, but also all that it tends to prove. And it was also there held that a motion to exclude the evidence, or to instruct the jury that they should find for the defendant, may be made after the evidence is heard on behalf of the defendant. To like effect is the case of *Joliet etc. Ry. Co. v. Velie*, 140 Ill. 59. In cases where the parties litigant agree that both matters of law and matters of fact may be tried by the court without a jury, and the only question at issue is the question at law whether the uncontroverted facts constitute a cause of action, no good reason is perceived why the defendant may not submit to the court such a proposition as proposition 8 now before us, to be "held" or "refused," by the court, as the court shall be of opinion the law of the case is, and why the submission of such a proposition should not be regarded as in the nature of a demurrer to evidence, and as sufficiently raising and

preserving the question of law involved for re-examination in a court of review.

The exact question now before us does not seem ever to have been passed upon by this court. But the case of *Pittsburg etc. R. R. Co. v. Reich*, 101 Ill. 157, was tried by the court without the intervention of a jury, and upon the appeal this court, in discussing the several propositions of law that were refused at the trial, used this language in regard to one of them: "The fourteenth proposition was properly refused, because there was evidence tending to sustain a cause of action. It asserts, simply, that under the evidence there can be no recovery. There was evidence tending to authorize a recovery. Its weight was for the court." The plain implication from this language is, that the propriety of holding or refusing a written proposition, such as that now ³⁰³ before us, will depend upon the answer given to the question whether or not there is evidence in the record which fairly tends to establish a cause of action.

The conclusion to be deduced from that which we have said is, that we consider this case properly before us for the consideration of the question, as a question of law, whether the evidence tends to show a right of recovery in appellee.

It may be well, in order to clearly understand the nature of the case upon which appellee relies, to briefly state the substance of its declaration. The declaration contains ten counts, nine of which are special, and each of these special counts describes a different instrument in writing, and the tenth count is a common *indebitatus assumpsit* count for interest. The first count avers that on May 17, 1887, "a certain person" made and drew, by and under the name and style of "W. S. Chapman, Treas.," a certain draft or order, in writing, for the payment of money, commonly called a check on a bank, with the heading "Central Union Telephone Company," and said check being numbered with the number 13,006, and caused said check to be countersigned by and under the style of "Geo. L. Phillips, Prest.," and directed said check to the appellee, and thereby requested it to pay three hundred dollars to C. H. Wilson, who was described therein as "C. H. Wilson, A. G. Supt.," and that afterward some one to plaintiff unknown, intending to defraud C. H. Wilson, and without the consent, knowledge, or ratification of Wilson, and without the knowledge of plaintiff, forged on said check the name of "C. H. Wilson, A. G. Supt.,"

and caused said check, so indorsed, to be placed in the hands of Chapin & Gore, who in turn indorsed it "For deposit in the First National Bank to the credit of Chapin & Gore," and delivered it to the appellant, who in turn indorsed it "Pay through Chicago Clearing House only to First National Bank," and through said clearing house presented said check to appellee for payment, and thereby vouched and ³⁰⁴ warranted to appellee that the indorsement of C. H. Wilson on said check was the genuine indorsement of said Wilson, and that appellee, confiding in said warranty of appellant, and in consideration thereof, and being ignorant that such indorsement was forged, paid said check to appellant, and took up the check; that appellee did not discover the fact of such forgery until July 25, 1887, when it notified appellant, tendered to it the check, and demanded that appellant should make good its warranty, and should repay to appellee the amount of the check, by means whereof appellant became liable to pay, promised to pay, and afterward refused, etc. The averments of the second count are substantially the same as those of the first count, except that the check is dated May 31, 1887, is numbered 13,051, and is for two hundred and fifty dollars. The averments of the third count are substantially the same as those of the first count, except that the check is dated June 13, 1887, is numbered 13,086, and is for two hundred dollars. The averments of the fourth count are substantially the same as those of the first count, except that the check is dated June 13, 1887, is numbered 13,087, and is for two hundred dollars, and except, further, that the count contains the additional averment that on June 30, 1887, appellee accepted said check, and wrote on the face thereof these words: "Accepted payable through Chicago Clearing House, June 30, 1887—Northwestern National Bank.—Sheahan, Teller." The averments of the fifth count are substantially the same as those of the first count, except that the check is dated July 5, 1887, is numbered 13,145, and is for two hundred dollars, and except, also, that there is no averment that it is countersigned by and under the style of "Geo. L. Phillips, Prest." The averments of the sixth count are substantially the same as those of the first count, except that the payee named in the check is "F. P. Ross, M'gr.," and except that the check is dated May 31, 1887, is numbered 13,049, and is for two hundred dollars. The seventh count is the same as the sixth count, except that date of check is

May 1, 1887, and its ³⁰⁵ number is 13,050, and it is for three hundred dollars and ten cents. The eighth count is the same as the sixth count, except that date of check is June 18, 1887, and its number is 13,085, and it is for two hundred dollars. The ninth count is the same as the sixth count, except that date of check is July 5, 1887, and its number is 13,147, and its amount is two hundred dollars, and except, also, that it contains an additional averment that on July 13, 1887, appellee accepted said check, and wrote on the face thereof: "Accepted payable through Chicago Clearing House, July 13, 1887.—Northwestern Nat'l Bank.—Sheahan, Teller."

The only plea filed to the declaration was that of the general issue, and issue was joined thereon. But at the trial a stipulation was made that appellant might, under that plea, introduce evidence to prove that the checks were otherwise forged, prior or in addition to the indorsements alleged to have been forged, and that such prior and other forgeries were on said checks when they came to the hands of appellant, and without its knowledge, provided the court should hold proof of such matter competent as a defense, and provided appellee might introduce, in reply, all matters in evidence, and provided the rulings of the court admitting or rejecting such evidence should be subject to exception by either party, other than on the point of its admissibility under the pleadings.

The declaration proceeds upon the theory that it is immaterial, as between the parties to this suit, who, in fact, drew the checks. The allegation in each of the special counts is, that "a certain person" drew the check. In 2 Chitty's Pleading, tenth American edition, *150, it is said that it is not necessary to state the names of the parties to a bill of exchange, unless they be plaintiffs or defendants. It may also be said that the declaration virtually admits that the several checks were genuine checks of the telephone company, and that the indorsements of the payees alone were forgeries.

At the trial the court admitted evidence to show that the signatures of the drawers of the checks were forgeries. ³⁰⁶ That evidence was introduced over the objections and exceptions of appellee, appellee specifying as grounds of objection that such inquiry was irrelevant to the issues in the cause, and that under the issues, and as between the plaintiff and defendant, the signatures of the drawers of the checks were conclusively presumed to be genuine. Appellee was right in

its contentions. A check payable to order is a bill of exchange payable to order on demand. The drawee of a bill of exchange or of a bank check is conclusively presumed to know the signature of the drawer, and if he accepts or pays, in the usual course of business, a bill or check whereon the signature of the drawer is a forgery, he will be estopped to afterward deny the genuineness of such signature: *First Nat. Bank v. Ricker*, 71 Ill. 439; 22 Am. Rep. 104; Bigelow on Estoppel, 4th ed., 498; 2 Herman on Estoppel, secs. 1006-1008. But the operation of an estoppel is reciprocal, for there can be no estoppel unless it be mutual. It must bind both parties, and one who is not bound by it cannot take advantage of it: 2 Herman on Estoppel, sec. 1295; Coke on Littleton, 352 a; *Griffin v. Richardson*, 11 Ired. 439; *Gaunt v. Wainman*, 3 Bing. 69, and 32 Eng. Com. L. 42; *Bentley v. Cleaveland*, 22 Ala. 814; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; 24 Am. Dec. 51. And so, as in respect to the transactions involved in the present litigation, appellee is precluded from questioning the genuineness of the signatures of the treasurer and president of the telephone company to the nine checks, so also is appellant estopped from so doing. The case stands, as between the parties to this suit, just as though the signatures of the drawers of the checks were authentic. To rule otherwise would be to disregard the maxim of the law, *allegans contraria non est audiendus*, and to permit appellant to blow both hot and cold with reference to the same transactions.

In the present case the admission of the incompetent testimony seems to have worked no injury, for when the ³⁰⁷ trial court came to make its findings upon the issues, it manifestly disregarded such testimony, as being irrelevant.

The estoppel, however, of which we have spoken, applies only to the case of the signature of the drawer, and of the drawer alone. A drawee is bound to know the signatures of his own customers, and a bank is bound to know the signatures of those who deposit with it and draw checks against such deposits. But the drawee or bank is not chargeable with knowledge of any other signature on the bill of exchange or bank check, and by accepting or paying the bill or check does not admit the genuineness of any indorsement on it: 2 Daniel on Negotiable Instruments, secs. 1364, 1365; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Vagliano v.*

Bank of England, L. R. 22 Q. B. Div. 103; on appeal, L. R. 23 Q. B. Div. 243. And even if a drawer draws a bill or a check payable to himself or his own order, and at once indorses it, an acceptance or payment of it by the drawee admits only the genuineness of the drawer's original signature, but not the genuineness of his indorsement: 2 Parsons on Bills and Notes, 483; 2 Daniel on Negotiable Instruments, sec. 1365; *Beeman v. Duck*, 11 Mees. & W. 251; *Williams v. Drexel*, 14 Md. 566.

At the trial C. H. Wilson testified for appellee as follows: "I lived in Columbus in May, June, and July, 1887, and was assistant general superintendent of the Central Union Telephone Company. That company, during those months, was accustomed to draw checks on the Northwestern National Bank to my order, under the designation of 'A. G. Supt.' The signatures to the indorsement of the checks mentioned in the first five counts of the declaration, and now shown me, are not my signatures. They are forgeries—every one of them. I never authorized any one to sign my name to those checks, nor did I know they were signed, nor have I ratified or approved the indorsements, or either of them." And F. P. Ross testified as follows: "I reside at Columbus, ~~see~~ Ohio. Was manager of the Central Union Telephone Company Exchange there in May, June, and July, 1887. Was accustomed to receive, from time to time, checks drawn by the Central Union Telephone Company to my order, as manager, on the Northwestern National Bank of Chicago, generally resembling the checks now shown me, described in the sixth, seventh, eighth, and ninth counts of the declaration. The indorsements on the back of them are not my indorsements. They are forgeries. I never authorized, consented, ratified, or approved such indorsements."

It is urged that the forgery of the indorsements is not sufficiently proven. The claim, as we understand counsel, is, that it does not appear that the checks were really drawn in favor of Wilson and Ross, respectively, in the sense that they thereby became the owners, respectively, of them, or that it was the intention of the drawer or drawers, by means of the checks, to pay them money, or that the checks were delivered to them, but that, on the contrary, it is logically deducible from the declaration and the evidence that the checks were delivered to some person whose name is not disclosed, and that it was the intention of the drawer or drawers that such

person should, in fact, receive the money, and it is submitted that in such state of the case it was not forgery on the part of the holder of the checks to indorse the name of Wilson, or that of Ross, on the checks payable to them, respectively. The contention seems to be, that there can be no real payee of a forged instrument, and no such thing as a forged indorsement of the name of the ostensible payee of a check to which the name of the drawer is forged. This argument is more specious than sound. It is a complete answer to it to repeat what we have already said in another connection: that, as between appellee and appellant, both parties are estopped from claiming that the original checks are not genuine, or that the name of the drawer signed to them is forged.

309 If further authority upon that point is desirable it is afforded by the recent (1889) judgment of the court of appeals in the case of *Vagliano v. Bank of England*, L. R. 23 Q. B. Div. 243. The amount there involved was about three hundred and fifty thousand dollars. In the bills of exchange there in question both the signatures of the drawer and the indorsements of the payee were forged. In this respect it was like the case at bar, and in respect to the questions at issue it was also singularly like it. It may be well to remark, by way of explanation of some of the language that we shall quote, that one of the questions under examination was whether a certain subsection 8 of a statute of 1882 was a mere codification of existing law or an alteration of it. The court there said: "The bank can only justify the payment that has been made, by showing that the documents were to be considered in the light of bills originally payable to bearer, in which case the bank would be authorized to pay the amount to the person who was the holder. Counsel for the bank contended before us that the payees named, C. Petridi & Co., were fictitious payees. A real and existing firm of that name was, in fact, carrying on business at Constantinople, and had been on previous occasions payees of genuine bills drawn by Vucina upon Vagliano Bros. It was unquestionably intended by Glyka that the acceptor should believe, and the acceptor in each case did believe, that the payees indicated were the C. Petridi & Co. in question, but it was urged by the appellant's counsel that as Glyka, the forger, intended to forge C. Petridi & Co's names, and never meant that they should have any thing to do with the bills, the payees were fictitious. . . . Before accepting such a construction of the

subsection it is desirable to state with precision what was the previous commercial law upon the subject. The law merchant seems to have been clear, and to have been based throughout on the principle of the law of estoppel, which, in its turn, is conformable with reason and business principles. The genuineness of the indorsement of ^{§10} the payee was a matter as to which, except in one special instance, no estoppel prevailed. The one exception to the rule was the case described in Story on Bills of Exchange, sections 56 and 200. This exceptional rule in the case of fictitious bills is based, as has been stated, on a special application to a particular case of the principle of estoppel, which plays so important a part in the law merchant." Then, after a review of the cases, the court added: "Down, therefore, to the date of the passing of the recent statute, the exception that bills drawn to the order of a fictitious or nonexisting payee might be treated as payable to bearer, was based uniformly upon the law of estoppel, and applied only against the parties who, at the time they became liable on the bill, were cognizant of the fictitious character or of the nonexistence of the supposed payee. The principle that lies at the root of the exception is, that a reasonable effect must be given, in favor of *bona fide* holders, to the act of acceptance, and that where it appears that although there was a named payee he was so completely fictitious or nonexisting that the acceptor could not have intended to restrict payment to such payee or his order, the acceptor, who must be taken to have intended that his acceptance should have some commercial validity, was estopped from saying that the bill was not a bill payable to bearer. If the exception is to be extended beyond this it will rest upon no principle at all, and this strange result would follow: that where, for purposes of fraud, a payee's name is introduced (whose signature it is intended to forge), the acceptor, though innocent and ignorant, will be bound to pay, and his bankers will be justified in paying without any indorsement at all. The acceptor, in such cases, will be a helpless victim. Ignorant, himself, of the fraud, believing from first to last that he has accepted a bill payable only to a particular payee or to his order, he will be held in law, nevertheless, to have accepted a bill payable to bearer. The word 'fictitious' must in each case be interpreted with due regard to ^{§11} the person against whom the bill is sought to be enforced. If the obligations of the acceptor are in ques-

tion, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle. . . . Petridi & Co., of Constantinople, did not cease to be real persons because Glyka meant to suggest, falsely, that they were to be the payees, and meant himself to forge their names. According to the ordinary sense of the English language the payees of these bills were not fictitious, but real, persons, from first to last, and to construe the (law) otherwise would be to render it the source of needless disorder and confusion in business transactions. The instruments in question were not, therefore, payable to bearer, and the bank having paid upon forged indorsements, must, in the absence of any other ground of defense, take the consequences."

When appellant indorsed the nine checks, and collected from appellee the sums of money called for by them, it warranted the genuineness of all the preceding signatures indorsed on the respective checks, including the indorsements on the checks of the names of the respective payees named in such checks: 2 Parsons on Bills and Notes, 588; *Williams v. Tishomingo Savings Inst.*, 57 Miss. 633; Story on Bills of Exchange, sec. 225. And, where a drawee or a bank pays a bill of exchange or a bank check to an indorser who derives title through a prior forged indorsement, he may recover back the money so paid, on discovery of the forgery, provided he makes demand for repayment within a reasonable time after the discovery of such forgery: 2 Daniel on Negotiable Instruments, secs. 1364, 1372; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Williams v. Tishomingo Savings Inst.*, 57 Miss. 633.

The evidence shows that appellee accepted two of the checks, "payable through Chicago Clearing House," prior to the time that they were transferred to Chapin & Gore.³¹² This makes no difference. An acceptor is bound to look only at the face of the bill or check, and an acceptance never proves an indorsement; and even if the supposed indorsements of the payees of said two checks were on them at the times when they were respectively accepted, yet such acceptances did not admit the handwriting of the indorsers: *Smith v. Chester*, 1 Term Rep. 654; *Robinson v. Yarrow*, 7 Taunt. 455; 2 Eng. Com. L. 445. In this case the acceptance or certification of the two checks simply warranted the genuineness of the sig-

natures of the drawer, and that it had funds sufficient to meet them, and engaged that those funds should not be withdrawn from the bank by the drawer, and that the bank would pay through the agency of the Chicago Clearing House the amount, if any, actually due on the check, to the person legally entitled to receive it. The acceptance or certification did not warrant the genuineness of the bodies of the checks, either as to the payees or the amounts, or warrant the genuineness of the indorsements on the checks: *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305; *Security Bank v. National Bank*, 67 N. Y. 458; 23 Am. Rep. 129.

The case made by the evidence introduced by appellee was in substance as follows: Nine several checks, of different dates and amounts, were made by some person, and signed and countersigned in manner and form as stated in the nine special counts of the declaration, five of which were made payable to C. H. Wilson, A. G. superintendent, and the remaining four to F. P. Ross, manager, and directed said checks to the appellee bank. All of these checks, each of them purporting to be indorsed by the payee therein named, were transferred, for value, to Chapin & Gore, who indorsed each of them "For deposit in the First National Bank to the credit of Chapin & Gore," and delivered them to appellant, and appellant also indorsed each of them "Pay through Chicago Clearing House only to First National Bank," and through said clearing house presented them, so indorsed, ³¹³ to appellee for payment, and received from it, in payment thereof, the full amounts called for by said checks. None of said checks were in fact indorsed by the payees therein respectively named, but all of the indorsements purporting to be made by the payees were forgeries, and appellee paid said checks in ignorance of such forgeries. After business hours on Saturday, July 23, 1887, appellee made discovery of the forgeries, and on the following Monday, July 25, 1887, it tendered the checks back to appellant, and demanded repayment of the money paid by it on the same, but appellant refused to make such repayment. Two of said checks, before they came into the hands of Chapin & Gore, had been accepted by appellee, it writing on the face of each of them these words: "Accepted payable through Chicago Clearing House."

In our opinion these facts established *prima facie* a right

of action in appellee as against appellant, and it follows that the trial court, in refusing to hold the eighth proposition submitted by appellant, to the effect that under the evidence the finding and judgment should, as a matter of law, be for appellant, committed no error.

The judgment of the appellate court is affirmed.

CHECKS.—DIFFERENCE BETWEEN AND BILLS OF EXCHANGE: See the extended notes to *Louisiana Nat. Bank v. Citizens' Bank*, 28 Am. Rep. 96; *Hawley v. Jette*, 45 Am. Rep. 133, and *Morrison v. Bailey*, 64 Am. Dec. 634.

BANKS—LIABILITY FOR PAYING FORGED CHECKS.—Banks are presumed to be familiar with the signatures of their customers or depositors, and are responsible for paying forged checks purporting to be signed by them: *Weiser v. Denison*, 10 N. Y. 68; 61 Am. Dec. 731, and note; *Commercial etc. Nat. Bank v. First Nat. Bank*, 30 Md. 11; 96 Am. Dec. 554, and note. This subject will be found fully treated in the notes to the following cases: *Janin v. London etc. Bank*, 27 Am. St. Rep. 90; *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 889; *National etc. Bank v. Ninth Nat. Bank*, 7 Am. Rep. 313, and *Laborde v. Consolidated Assn.*, 39 Am. Dec. 519.

ESTOPPELS MUST BE MUTUAL TO BE BINDING: *Ferguson v. Jones*, 17 Or. 204; 11 Am. St. Rep. 808, and note.

CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY v. KNEIRIM.

[152 ILLINOIS, 458.]

RAILWAY CORPORATIONS—MASTER AND SERVANT.—It is the duty of a railway corporation to exercise reasonable and ordinary care and diligence in providing and keeping in repair reasonably safe machinery and appliances for the use of its employees, and this is a continuing duty requiring the corporation to exercise reasonable diligence and care in supervision and inspection.

MASTER AND SERVANT.—THE DELEGATION OF A DUTY WHICH THE MASTER OWES TO HIS SERVANT OF EXERCISING REASONABLE AND ORDINARY CARE AND DILIGENCE in providing and keeping in repair reasonably safe machinery and appliances cannot relieve him from liability to a servant injured by the failure to exercise such care and diligence on the part of another servant to whom the duty has been delegated.

MASTER AND SERVANT.—A SERVANT OF A RAILWAY CORPORATION DOES NOT ASSUME THE RISK OF THE NEGLIGENCE OF HIS EMPLOYER in failing to have the machinery and appliances in a reasonably safe condition. He has the right to believe the cars used are, as to their repair, in a reasonably safe condition, and that the master's duty in that respect has been discharged.

NEGLECT, CONTRIBUTORY.—A HELPER IN THE YARD OF A RAILWAY CORPORATION, whose duties require him to catch cars while in motion, and climb on and set the brakes, and, when making up a train, to couple the cars, cannot be held guilty of contributory negligence in fail-

ing to examine a brake-rod, wheel, and nut, and in not discovering that the nut which held the wheel on the brakestaff was off. His duties are not the same as those of a brakeman of a freight train, and therefore he cannot be held to be negligent in not discovering defects which it would have been the duty of such a brakeman to discover.

MASTER AND SERVANT—VICE-PRINCIPALS.—If a servant of a railway corporation is intrusted with a duty that belongs to his principal as a primary duty, the negligence of such servant is negligence for which the principal is answerable to another servant injured thereby.

MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE, WHEN A QUESTION OF FACT.—Whether a helper in the yard of a railway and a brakeman who brought the train into such yard, and the inspectors of the cars of such train are fellow-servants, is a question for the jury, and it is not error to refuse to instruct the jury that these employees were fellow-servants.

MASTER AND SERVANT—FELLOW-SERVANTS.—If one servant is injured by the negligence of another servant while they are directly co-operating with each other in a particular business in the same line of employment, or their duties bring them into habitual association so that they may exercise mutual influence upon each other, promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not answerable to the other servant suffering therefrom.

JURY TRIAL.—AN INSTRUCTION, THOUGH ERRONEOUS, will not require the granting of a new trial, if it appears from the evidence that no other verdict could have been properly returned by the jury under instructions entirely correct.

DAMAGES—MEASURE OF.—AN INSTRUCTION TO THE JURY in an action to recover damages for the death of a railway employee, that they should assess the damages at whatever sum they should deem just and reasonable from all the evidence in the case, not exceeding the amount of the declaration, is not erroneous. The instruction could not have been understood by the jury to have authorized damages to be assessed by way of *solatium*, if there is no claim for such damages made in the declaration.

ACTION to recover damages resulting from the appellee's intestate, George H. Kneirim, being run over and killed by a car of the appellant. He was a switchman employed in the yard of the appellant. His duties were to couple and uncouple cars, and manage brakes upon cars which were being switched. A train came into the yard and was inspected by the employees of the appellant to whom that duty was assigned, and who had been working in the same yard with the decedent for several years. It was claimed that the appellant and its employees had been negligent in not observing that a nut by which a brake-wheel had been fastened on the brake-staff had come off, and in permitting the use of such brake and staff without any nut, and that the death of the defendant was caused by the wheel becoming detached

while he was attempting to perform his duties. Verdict and judgment were in favor of the plaintiff, and the corporation appealed.

W. H. Lyford, and J. B. Mann, for the appellant.

M. W. Thompson and G. W. Salmans, for the appellee.

⁴⁶¹ PHILLIPS, J. The questions arising on this record are on the motion of appellee to exclude the evidence and instruct the jury to find for the defendant, on instructions given for appellee, and the modification of instructions asked by appellant.

It is the duty of the company to exercise reasonable and ordinary care and diligence in providing and keeping in repair reasonably safe machinery and appliances for the use of its servants; and this is a continuing duty, requiring the company to exercise reasonable diligence and care in supervision and inspection. The delegation of that duty to an employee does not relieve the company from liability because of the negligence of that employee in the discharge of that duty: *Chicago etc. R. R. Co. v. Avery*, 109 Ill. 314; *Chicago etc. Ry. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661; *Chicago etc. Ry. Co. v. Swett*, 45 Ill. 197; 92 Am. Dec. 206.

The duties of George H. Kneirim, as a helper in the yards, were to catch and couple cars. A train coming into the yards is checked up on the switch-list, with each car number put down opposite the destination of the car. The foreman in charge of the yard engine takes the list, cuts off the cars, and places them on the different tracks ⁴⁶² for the purpose of making up the several trains or transferring to another road. The helpers, in catching the cars, climb on and set the brakes, and when making up the train, couple the cars. The helper would mount the car when in motion by the direction of the foreman, or, when knowing his duties, without direction from any one. It also appears from the evidence that a train coming into the yards where Kneirim was injured would be left by the train crew that brought it in, and there be examined by the inspectors employed for that purpose, their duty being to inspect the train before the yard engine cuts the train up. By that inspection they were to examine all the cars to see if they were in proper condition for running, and if any of the machinery and appliances were out of repair to fix the same, but, if unable to fix them, to mark the car with chalk over its number, and it was then

to be sent to the shops. The inspectors who examined this train did not inspect the brake-staff of the car, because of the imperfect and unsafe condition of which plaintiff was injured. The evidence shows that the nut which held the wheel on the brake-staff was off, and, from the rusted appearance of the threads on the staff—they being filled with rust—had been off for several weeks. Kneirim, who was on duty as a helper, and in the night-time, when this car was cut from the train and sent back on the switch, mounted the car while it was in motion, and after it had run several car lengths set the brake, and the wheel coming off of the brake-staff caused him to fall and be run over, so injuring him that death soon resulted.

It is insisted that Kneirim assumed the ordinary hazards of his employment, and was required to use reasonable care and caution for his own safety, and should have examined the brake to assure himself it was in a proper condition of repair. Whilst Kneirim assumed the ordinary dangers and risks of his employment, he did not assume a risk of the negligence of the employer in failing ⁴⁶³ to have the cars and appliances in a reasonably safe condition. He had a right to believe the cars were, as to their repair, in a reasonably safe state, and that the master's duty in that regard had been discharged. They had just passed an inspection by men employed for that purpose. His duties required him to act promptly, and it cannot be expected or required that he should act with the deliberation and circumspection that could be exercised by the inspectors. He could not, from the nature of the duties he discharged, be expected to examine the brake-rod as to whether there was a loss of a nut that caused it to become unsafe. The car had not been under his supervision or control. He had no former care of it. It passed him, and whilst in motion his duties required him to mount it and set the brake. He was not, and could not be, responsible for the defect, nor could he be held guilty of contributory negligence in failing to examine the brake-rod, wheel, and nut, under the circumstances: *Chicago etc. Ry. Co. v. Jackson*, 55 Ill. 492; 8 Am. Rep. 661.

The case of a helper in a switch yard is unlike the case of a brakeman on a freight train, whose most important duty is the management of the brakes, and whose duties bring him in contact with the train such a length of time that it becomes his reasonable duty to see whether the brakes are in

order, as held in *Chicago etc. R. R. Co. v. Bragonier*, 119 Ill. 51, and in *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240. In the latter case it was held: "The condition of the brake was a matter under the special care of the brakeman, and it was his business, at all times, to see that it was in a fit condition for use, and report defects to the company." The jar of a train in motion having a tendency to cause the nuts to loosen and come off, the brakeman is required to be constant and watchful as to the condition of the brakes. Where a car is sent out immediately after inspection, and in an unsafe condition of repair, and injury results from ~~464~~ such cause and under such conditions, a case would be presented, as to brakemen, that is not included in *Chicago etc. R. R. Co. v. Bragonier*, 119 Ill. 51, and in *Illinois Cent. R. R. Co. v. Jewell*, 46 Ill. 99; 92 Am. Dec. 240.

It is next urged that the injury resulted to Kneirim through the negligence of a fellow-servant. The claim is, that the brakeman who brought the train to the yards was charged by law with the duty of ascertaining that the brake was in order, and report any defects to the proper person, that they might be remedied, and the car inspectors were charged with a like duty; that Kneirim was frequently handling cars coming from such brakeman and passing such inspection. The master's duty of supervision and inspection is one that cannot be delegated so as to relieve the master of liability. Whilst a corporation must act through its servants, yet when such servants are intrusted with a duty that belongs to the principal as a primary duty, the negligence of the servant intrusted with that duty is negligence for which the principal is liable. The corporation can only see, examine, and determine the condition of repair in which a car may be, by its inspectors. That duty must be exercised with the same degree of diligence by such employees as is imposed on a natural person who may be the master. Whether the brakeman and the helper were engaged in a distinct and wholly different business, and whether a relation existed between them by which one might exercise any influence on the other promotive of proper caution, are questions of fact, as is also the question of the relation of this helper to the train crew with which the brakeman served, who brought the train into the yards, and there left it in charge of the inspectors. Not until the latter had made their inspection was the train in charge

of the foreman of the yards to be broken up for the purpose of making up other trains, and only after inspection was the work of the switch engine and helper brought into requisition. Whether the helper, under such circumstances, is a fellow-servant of the brakeman who brought the train ⁴⁰⁵ into the yards, or of the inspectors, is to be passed on by the jury, and it was not error to refuse to instruct the jury to find for the defendant.

Error is assigned in giving instructions for appellee. The first instruction given for appellee correctly stated the duty of the appellant as to furnishing reasonably safe machinery and appliances, and its duty to exercise reasonable diligence, care, and skill in keeping the same in repair. The second instruction given for the appellee was:

"It is the duty of a railroad company to provide car inspectors to inspect their cars and trains and machinery, and to see that the same are in proper repair; and if a brakeman in the employ of a company, while in the exercise of due care and caution for his own safety, should receive an injury on account of the negligence or carelessness of such car inspector in not noticing and reporting defects in the machinery, then, and in that case, such company would be liable to the parties injured for such injury, unless you believe, from the evidence, they were fellow-servants in the same line of employment as defined in these instructions."

The negligence charged in the declaration was: "The plaintiff avers that the defendant then and there carelessly and negligently failed to have said wheel properly and securely fastened upon said brake-staff, so that the same would not come off when a brakeman, in the use of said wheel, attempted to set said brake, and by reason of said wheel not being properly and securely fastened, and the negligence and carelessness of the said defendant, as aforesaid, said Kneirim was thrown upon the tracks, injured, and killed." The negligence charged was in failing to have the brake-wheel securely fastened upon the brake-staff, etc. By the second instruction the jury are told that it is the duty of the company to provide car inspectors, and, if a brakeman receives an injury because of the negligence of the inspectors in not noticing and ⁴⁰⁶ reporting defects, the company would be liable. The attention of the jury should have been directed to the negligence charged in the declaration, and not to the negligence of the inspectors in failing to notice defects. The

instruction was improper. The cause of the injury was shown to have been the defective fastening of the wheel to the brake-staff.

Appellant excepted to the giving of the third instruction for appellee, and the modification of the fifth instruction asked by the appellant. The questions raised in these two instructions may be considered together.

The third instruction given for appellee, to which objection is made, is as to the definition of "fellow-servants," as, they "must be such as are engaged in the same line of employment, and whose duties bring them into habitual association with each other, so that they may exert a material influence upon each other promotive of proper caution." The fifth asked by the appellant was modified so as to state, if "they were engaged in the same general line of business, directly co-operating with each other in the particular business, and that their duties were such as to bring them into contact and habitual association with each other in such a manner that they would exercise upon each other a mutual influence promotive of proper caution."

The rule in this state is, that where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable: *Chicago etc. R. R. Co. v. Moranda*, 93 Ill. 302; 34 Am. Dec. 168; *Stafford v. Chicago etc. R. R. Co.*, 114 Ill. 244; *Chicago etc. R. R. Co. v. Geary*, 110 Ill. 383; *North Chicago Rolling Mill & Co. v. Johnson*, 114 Ill. 57; *Chicago etc. Ry. Co. v. Snyder*, 117 Ill. 376; *Chicago etc. Ry. Co. v. Snyder*, 128 Ill. 655; *Chicago etc. R. R. Co. v. Hoyt*, 122 Ill. 369; *Chicago etc. Ry. Co. v. Moranda*, 108 Ill. 576; *Chicago etc. R. R. Co. v. Kelly*, 127 Ill. 637; *Joliet Steel Co. v. Shields*, 134 Ill. 209.

These instructions, as given and modified, did not correctly state the rule as to the relations of fellow-servants. Servants may be directly co-operating with each other in a particular business, in the same line of employment, and yet not be such that their duties bring them into habitual association, so that they may exercise a mutual influence on each other promotive of proper caution. These clauses should have

been connected by the disjunctive "or," instead of the conjunctive "and." The error, however, in the second and third given for appellee, and the modification of the fifth asked by appellant, when the facts were made so prominent by the evidence as appears in this record, could not have misled the jury to the prejudice of the appellant. The duties of the car inspectors and of the helper were clearly shown by the evidence. Their relation to each other depended on evidence which was clear and explicit. The proximate cause of the injury could not have been misunderstood, and the error in the instructions, under the facts in this case, could not have prejudiced the appellant. Whilst this court is bound by the finding of facts as made by the appellate court, it yet becomes the duty of this court to look into the evidence in the record in determining the correctness of instructions based on the facts of a case. Where this duty, thus imposed, is discharged by this court, and from the evidence it appears that no other verdict than that rendered could have been properly returned by the jury under instructions entirely correct, we are not required to reverse a judgment because of errors in instructions.

468 The fourth instruction given for appellee was, if the jury should find for the appellee they should assess the damage at whatever sum they "should deem just and reasonable, from all the evidence in the case, not exceeding the amount claimed in the declaration." The declaration alleges pecuniary loss by reason of the death of the husband and father, who, in his lifetime, was in receipt of a certain sum for his wages and services, which was used in the maintenance and support of his wife and children. The instruction referring to the declaration could not have been understood by the jury to have authorized damage to be assessed by way of *solatium*, for there is no claim for such damage made in the declaration. The objection made to the fifth instruction given for the appellee is not tenable.

From a careful examination of the record we find no reversible error in the judgment of the appellate court, and that judgment is affirmed. _____

RAILROADS—DUTY TO SERVANT TO FURNISH SAFE MACHINERY.—A railroad company owes a duty to its servants to furnish reasonably safe machinery and keep it in repair: *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336; *Elledge v. National City etc. Ry. Co.*, 100 Cal. 282; 38 Am. St. Rep. 290, and note, with the cases collected.

MASTER AND SERVANT—RAILROADS.—That the liability of a master for failing to furnish safe machinery for a servant's use cannot be avoided by his delegating the same, see *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187.

RAILROADS—MASTER AND SERVANT.—That a servant does not assume the risks of defective machinery furnished him by the master, unless he has knowledge or notice of such defective condition, see *Kehler v. Schwenk*, 151 Pa. St. 505; 31 Am. St. Rep. 777, and note; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187, and note; and *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 336, and note.

VICE-PRINCIPALS—WHO ARE.—A person employed by a master, and given power to superintend, control, and direct other employees engaged in the performance of certain work for the master, is, as to the men under him, a vice-principal: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66; 41 Am. St. Rep. 85, and note. As to his servant, a master is liable for negligence in respect to those acts or duties he is required to perform as master, without regard to the rank or title of the agent to whom he has intrusted the performance of such duties or acts: *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616, and note.

MASTER AND SERVANT—MASTER'S LIABILITY FOR NEGLIGENCE OF FELLOW-SERVANT.—A railroad company is not liable to one of its agents for an injury arising from the negligence of another competent servant: *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note; *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; 38 Am. St. Rep. 163, and note.

HENNESSY v. METZGER.

[152 ILLINOIS, 505.]

PENALTY OR LIQUIDATED DAMAGES.—To DETERMINE WHETHER A SUM SPECIFIED IN A CONTRACT IS A PENALTY OR LIQUIDATED DAMAGES the court will consider the language used, the subject matter of the contract, and the intention of the parties. The fact that the parties used the words "liquidated damages" in their agreement does not always determine the question. The courts generally lean toward that construction which excludes the idea of liquidated damages, and permit the party to recover only the damages which he has actually sustained.

ARCHITECT, DECISION OF, WHEN FINAL.—If the parties to a building contract agree that the architect shall pass upon the work and certify upon the payments to be made his decision is binding, and can be attacked only for fraud or evident mistake. If, in such a contract, provision is made for payment of the price upon presentation of the architect's certificate, the obtaining of such certificate is a condition precedent to the right to require payment, and to maintain an action therefor in case payment is refused on the architect's certificate as to delay in performing work, and as to the damages recoverable therefor. If a building contract specifies that the decision of the architect shall be binding in case of any disagreement between the parties relating to the performance of any covenant therein, and that damages shall be allowed for the nonperformance of the contract at the sum of fifty dollars for each

and every day the work remains undone after a date named therein, which sum should be deducted from the contract price, the architect is empowered to determine the extent to which delay was due to the fault of the contractor, and to deduct from the amount of his certificate the fifty dollars for each day's delay for which he finds the contractor chargeable.

PENALTY OR LIQUIDATED DAMAGES.—If a building contract names the day at which it is to be completed, and declares that the contractor for each day's delay beyond that time shall be charged with the sum of fifty dollars as liquidated damages, and it is difficult to determine what the actual damages were, the sum named will be treated as liquidated damages, and the builder held answerable therefor.

PENALTY OR LIQUIDATED DAMAGES.—Where, from the nature of a contract, the damages cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract.

ASSUMPSIT to recover for work done and material furnished in the construction of a building. Under the contract between the parties the plaintiff agreed to erect and complete certain work in and about buildings to be erected for the defendant according to drawings and specifications made by architects named in the contract, and which drawings and specifications the contract stipulated should be considered as a part thereof. The date for the completion of the building was named, and it was specified that all damages for delay should be deducted from the contract price as liquidated damages. Among the specifications was a provision declaring that, "in order to secure the completion of the work at the time and in the manner specified, it is hereby declared and set forth that the damages arising from the nonfulfillment of this contract shall be fifty dollars per day for each and every day the work remains undone after the above-named date, which sum of damages shall be deducted from the contract price as liquidated." The architect's certificate, after determining the amount due to the plaintiffs for the work stipulated in their contract, and for extra work required by the plaintiffs, deducted from the total, thirteen hundred and fifty dollars, for twenty-seven days' delay, at the price of fifty dollars per day. A judgment was rendered in favor of the plaintiffs, but for a less sum than that claimed to be due, and they therefore appealed.

Osborn Bros. & Burgett, for the appellants.

L. H. Bisbee and W. N. Gemmill, for the appellee.

513 **MAGRUDER, J.** The principal question in this case is whether or not the architects, in fixing the amount of the

final certificate, had a right to deduct the item of thirteen hundred and fifty dollars. This amount represented damages for delay at fifty dollars per day for twenty-seven days. By the terms of the specifications the work was to be completed by June 1st. It was not completed until July 21st. The architect decided that the appellants were chargeable with twenty-seven days of delay, at fifty dollars per day, between June 18th and July 21st. By holding that they were not chargeable with delay until June 18th he held that the delay from June 1st to June 18th was proper and excusable.

By the terms of the contract "it is agreed that all damages for delay as mentioned in the specifications shall be deducted from the contract price as liquidated damages." As the contract price was to be paid out "upon presentation of certificates signed by said architects," the deduction was necessarily to be made by the architects, in order to determine the amounts for which the certificates should be issued. The deduction was to be made of "all damages for delay as mentioned in the specifications." What damages are mentioned in the specifications?

⁵¹⁴ The specifications provide that, "in order to secure the completion of the work at the time and in the manner specified, it is hereby declared and set forth that the damages arising from the nonfulfillment of this contract shall be fifty dollars per day for each and every day the work remains undone after the above date, which sum of damages shall be deducted from the contract price as liquidated damages." Are appellants chargeable with damages at fifty dollars per day for the time following the day fixed by the agreement for the completion of the work, or are they chargeable only with such actual damages as may have resulted from their delay?

Whether the sum fixed by the contract is to govern, or whether the actual damages are to be considered, depends upon the question whether the stipulated amount is to be regarded as a penalty or as liquidated damages. If it be a penalty no other sum can be recovered or allowed than that which will compensate for the actual loss. If the amount named in the contract be regarded as liquidated damages it forms the measure of damages, and the jury are confined to it: Sedgwick on Measure of Damages, 6th ed., 396, 397. In order to determine whether the stipulated sum is a penalty or liquidated damages the court will consider the language used, the subject matter of the contract, and the intention

of the parties. The fact that the parties use the words "liquidated damages" in their agreement does not always determine the question: *Scofield v. Tompkins*, 95 Ill. 190; 35 Am. Rep. 160; Sedgwick on Measure of Damages, 6th ed., marg. p. 399.

In the present case, however, these words are not only used in the specifications, but in the main body of the contract. Their repetition would seem to indicate that it was the intention of the parties to have the damages for delay fixed at a particular sum, so as to be deducted from the contract price before the certificates of the architects should be issued. The courts generally show a disposition to lean toward that construction, which excludes ⁵¹⁵ the idea of liquidated damages, and permits the party to recover only the damage which he has actually sustained: Sedgwick on Measure of Damages, marg. p. 399. But the effort of the court will be to get at the true intent of the parties, and to do justice between them: Sedgwick on Measure of Damages, marg. p. 421. Here, we are inclined to think, that a careful study of all the provisions of the contract, and of the specifications which are to be considered a part of the contract, reveals an intention to fix upon damages which are liquidated, stipulated, or stated; that is to say, to agree upon a definite sum as that which shall be paid to the party who alleges and establishes the violation of the agreement: Sedgwick on Measure of Damages, marg. p. 398.

Where the parties to a building contract agree that the architect shall pass upon the work and certify as to the payments to be made, his decision is binding, and can only be attacked for fraud or evident mistake: *McAuley v. Carter*, 22 Ill. 53; *Korf v. Lull*, 70 Ill. 420. In such a contract, if provision is made for payment of the price upon the presentation of the architect's certificate, the obtaining of such certificate is a condition precedent to the right to require payment, and an action cannot, as a general rule, be maintained to recover the money until the certificate has been obtained from the architect: *Michaelis v. Wolf*, 136 Ill. 68; *Arnold v. Bour-nique*, 144 Ill. 132; 36 Am. St. Rep. 419. Here, not only is it agreed that the owner is to pay the contract price of fifteen thousand six hundred dollars, upon presentation of certificates signed by the architects, but the decision of the architects is made final as to certain matters upon which they are authorized to pass.

If the parties fail to agree as to the true value of extra or deducted work, the decision of the architects shall be final and binding. The proof tends to show that there was a disagreement upon these subjects, and there is no reason why the decision of the architects in relation thereto should not be regarded as final. The contract ⁵¹⁶ provides that, in case the alterations or deviations required by the owner call for additional time for execution, a fair and reasonable amount shall be added to the time stipulated for the completion of the said building as set forth in the specifications; and that, as to the amount of extra time, the decision of the architects shall be final and binding. The proof tends to show that there was a disagreement upon this subject; and, as the architects allowed eighteen days for such extra time, we see no reason why the allowance should not be accepted. The contract provides that the decision of the architects shall be final and binding," in case of any disagreement between the parties relating to the performance of any covenant or agreement herein contained." One of the agreements contained in the contract is, that all damages for delay, as mentioned in the specifications, shall be deducted from the contract price as liquidated damages. The proof tends to show that there was a disagreement upon this subject. The architects were just as much empowered to decide upon the performance of this agreement for the deduction of the stipulated damages as upon the performance of any other agreement in the contract. They had the power, also, to make a final and conclusive decision respecting the construction or meaning of the specifications, in case of any dispute in relation thereto. This included that portion of the specifications in relation to damages as well as any other portion thereof.

It is said, however, that, where the clause fixing the amount of the damages appears to have been inserted to secure prompt performance of the agreement, it will be treated as a penalty, and no more than the actual damages proved can be recovered: *Scofield v. Tompkins*, 95 Ill. 190; 35 Am. Rep. 160. We do not think that this rule is applicable to the damage clause in the specifications here. The specifications are to be considered as a part of the contract. The contract and specifications are one instrument. Although the specifications designate June 1st as the date for the ⁵¹⁷ completion of the work, yet the contract provides that the additional time to be allowed, which in this case was

eighteen days, shall be added to the time for the completion of the work as set forth in the specifications. Where, therefore, the specifications declare that the damages arising from the nonfulfillment of the contract shall be fifty dollars per day for each and every day the work remains undone "after the above date," in order to secure the completion of the work "at the time and in the manner specified," the reference must be understood to be, not to the precise time or date specified, as, for instance, June 1st, but to the time or date as fixed by the addition of such extra time as has been made necessary by the alterations or deviations referred to, and as has been decided upon by the architects; that is to say, June 18th. So, the words "in the manner specified" do not refer exclusively to the details of the work set out in the specifications as originally drawn, but to said details as modified or changed by the alterations which the owner is allowed to make. The damages are not allowed as a mere penalty for the noncompletion of the contract at the time and according to the terms originally designated, but for a failure to complete it at the time and according to the terms which may be decided to be "equitable and just," and "fair and reasonable," in view of allowable alterations or deviations.

It is evident that it would be quite difficult to ascertain the damages resulting from delay in the completion of a mill, built, as this was, to be used for the manufacture of linseed oil. Where, from the nature of the contract, the damages cannot be calculated with any degree of certainty the stipulated sum will usually be held to be liquidated damages, where they are so denominated in the instrument: *Sedgwick on Measure of Damages*, marg. p. 422; *Lynde v. Thompson*, 2 Allen, 456; *Texas etc. Ry. Co. v. Rust*, 19 Fed. Rep. 239; *Wolf v. Des Moines etc. Ry. Co.*, 64 Iowa, 380; *Cushing v. Drew*, 97 Mass. 445; *Consolidated Coal Co. v. Peers*, 150 Ill. 344; 5 Am. & Eng. Ency. of Law, 25, and cases in notes. It has been held that damages for delay in completing a house are such uncertain damages as indicate an intention to agree upon a fixed measure of damages and not to name a sum as a penalty merely: *Hall v. Crowley*, 5 Allen, 304; 81 Am. Dec. 745.

For the reasons here stated we are of the opinion that the trial court did not err in instructing the jury that the plaintiffs were entitled to recover the contract price together with

the value of the extra work, less deductions and less damages on account of failure to complete the building according to the contract, unless they should find, under the evidence and the instructions of the court, that the plaintiffs were concluded by the certificate of the architects as to such extras, deductions, and damages.

The question whether, in fixing the amount of the final certificate, the architects acted fraudulently, capriciously, arbitrarily, or unreasonably, or failed to exercise their judgment honestly, impartially, and free from bias in favor of the defendant, was submitted to the jury by the instructions of the court; and upon this question, which is one of fact, the judgment of the appellate court is final, so far as we are concerned.

After a careful examination of the whole record in this case we are satisfied that the judgment of the trial court, as affirmed by the appellate court, does justice between the parties, and that there is no sufficient reason for a reversal of the judgment of the latter court.

The judgments of the appellate and circuit courts are affirmed.

PENALTY OR LIQUIDATED DAMAGES—HOW DETERMINED.—This subject is thoroughly discussed in *Monmouth Park Assn. v. Wallis Iron Works*, 55 N. J. L. 132; 39 Am. St. Rep. 626, and note, with the cases collected; and, also, the extended notes to *Williams v. Vance*, 30 Am. Rep. 28, and *Graham v. Bickham*, 1 Am. Dec. 331.

BUILDING CONTRACTS—NECESSITY FOR PRESENTATION OF ARCHITECT'S CERTIFICATE.—If, by the terms of a building contract, it is provided that payment shall be made only upon the certificate of the architect, such certificate is a condition precedent to payment, and no action can be sustained unless it is shown that such certificate has been demanded from the architect and fraudulently withheld: *Arnold v. Bournique*, 144 Ill. 132; 36 Am. St. Rep. 419, and note.

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ATLAS NATIONAL BANK v. MORE.

[152 ILLINOIS, 523.]

JURISDICTION.—A COUNTY COURT IN ILLINOIS, acting in insolvency proceedings, has jurisdiction to determine that a judgment rendered against the insolvent is not a lien upon his property or the proceeds thereof in the hands of his assignee, and to declare that such judgment, or some part of it, shall not be paid out of such proceeds.

CORPORATION—NOTE GIVEN WITHOUT CONSIDERATION.—A note executed by a corporation, the real purpose of which is to secure a debt due to the payee from a business partnership, but which purports to be given in consideration of a purchase of a lot of notes then known to be substantially worthless, and to represent the accumulated losses of such firm, and when the vote authorizing the giving of the note was cast by directors of the corporation, all of whom were personally interested in the giving of such note, because it would relieve them from liability by imposing such liability on the corporation, and the securities for the purchase of which the note was given were never turned over to the corporation, is a mere sham, and, if the corporation is subsequently declared an insolvent debtor, its assets should not be applied to the payment of a judgment based upon such note.

CORPORATION—TRUST IN FAVOR OF CREDITORS.—Equity regards the property of a corporation as a fund held in trust for its stockholders while it is solvent, and for the payment of its debts when it becomes insolvent, and if others than *bona fide* creditors possess themselves of it then, in case the corporation becomes insolvent, they hold it charged with a trust in favor of its creditors, and such trust a court of equity will enforce.

IF A JUDGMENT OR DECREE IS PROCURED THROUGH THE FRAUD OF EITHER OF THE PARTIES OR BY COLLUSION OF BOTH, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained. A judgment will not be upheld against the creditors of the judgment debtor if it is not founded on an actual debt or other legal liability due or enforceable at the time of its entry. A third party whose rights are affected may prove that there was no debt from the judgment debtor.

A COLLUSIVE JUDGMENT IS OPEN TO ATTACK whenever it may come into conflict with the rights or the interests of third persons, as fraud is not a thing which can stand even when robed in a judgment.

Flower, Smith & Musgrave, for the Appellant.

Weigley, Bulkley & Gray, and Jacob Newman, for the appellee.

530 BAKER, J. For some years prior to September 27, 1888, Wilson & Bayless, a partnership composed of George Wilson, Jr., and Theodore P. Bayless, had been doing business in the city of Chicago as dealers in furniture, which was for the most part sold upon the installment plan—that is,

the furniture was delivered and either leases or chattel mortgages obtained from the vendees. They had had a line of credit with the Atlas National Bank, the appellant, with whom they had been doing business for some time,⁵³¹ and as security for loans to them they had, under an agreement with the bank, kept at the bank, as collateral, a tin box containing leases and chattel mortgages, and notes secured thereby, to an extent of about fifty per cent above their loans. These mortgages and leases were, in most instances, for small amounts, and secured upon household furniture sold to people in moderate circumstances all over the city of Chicago. During two years and upwards the box of collaterals remained in the bank, and Wilson & Bayless and their book-keeper were allowed free access to it for the purpose of taking away any collaterals and replacing the same with others. No account was kept by the bank of the collaterals so removed and replaced, nor was there any requirement made by the bank that if Wilson & Bayless collected any of the collaterals so removed they should deposit the proceeds with the bank in reduction of their debt. In addition to the box of collaterals, Wilson & Bayless also gave the bank, in March, 1888, two judgment notes, each for seven thousand five hundred dollars signed by the members of the firm individually, which were to be also held as security by the bank.

Some time prior to said first-named date of September 27, 1888, George Wilson, Jr., consulted W. C. D. Grannis, the president of appellant, upon the advisability of forming a corporation which should buy out the merchandise stock of Wilson & Bayless, and the goodwill of their business—in fact, everything except the chattel mortgages and leases belonging to the firm, deposited with the bank and elsewhere. Grannis, as the representative of their largest creditor, consented, and advised an incorporation and the transfer of the assets, and stipulated that Wilson & Bayless should deposit about eleven thousand dollars par value of the capital stock of the new corporation as additional security for the debt which they owed appellant.

On the date first mentioned, to wit, September 27, 1888, Wilson & Bayless, together with their attorney, one George Warvelle, their book-keeper, one Charles F. Halbe,⁵³² and one John M. Wilson, a brother of said Wilson, organized a corporation under the name of Wilson & Bayless Company, which company purchased the stock of goods and succeeded

to the business of Wilson & Bayless. It, however, did not purchase the outstanding leases and chattel mortgages of the old firm, nor did it assume its liabilities, but it continued the old business at the firm's location on West Madison street, Chicago, Illinois, and continued to do the same kind of business that had been done by Wilson & Bayless as a firm. The directors of the company were George Wilson, Jr., Theodore P. Bayless, George W. Warvelle (who was both its attorney and the attorney for the firm of Wilson & Bayless), Charles Noyes, and W. S. Tillotson, who was the general book-keeper of the appellant in its bank. In the organization of the corporation J. M. Wilson was made president; Bayless, vice-president; Halbe, secretary; Bayless, treasurer, and George Wilson, Jr., manager. On the 5th of October, after the organization of the company, Wilson & Bayless pledged to appellant two certificates of stock, of fifty-five shares each, issued to them, respectively, as further collateral securities for their account, the terms of the pledge being in writing.

On the tenth day of November, 1888, the bank held notes of Wilson & Bayless, falling due at various times in the future, aggregating ten thousand dollars. On that day Halbe, who was acting not only as secretary of the company, but also as book-keeper of the firm of Wilson & Bayless in winding up its affairs, visited the bank for the purpose of obtaining collaterals from the tin box for collection. While he was examining the same the president of the bank, Grannis, happened to come into the room, and noticed that some of the notes were past due and uncollected, and, after a short conversation with Halbe, requested him to have Wilson & Bayless come to the bank at once, as he was dissatisfied with the security held. As a result Wilson, Bayless, and Warvelle came to the bank, and an interview ⁵²² was had between them and Grannis and Tillotson of the bank, the result of which was, that an arrangement was made by which it was agreed that the directors of the corporation should pass a proper resolution, and that there should be given to the bank, in lieu of the box of collaterals, and in consideration thereof, a judgment note for the corporation for the sum of fifteen thousand dollars, which should be held as collateral security for the liability of Wilson & Bayless then existing, and for such further sums as should be advanced by the bank.

At the regular meeting of the directors following the 10th of November, to wit, on the 13th of November, 1888, a resolution was passed, which was prepared by Warvelle, who was the attorney for the corporation as well as a director, which provided for the purchase of the box of collaterals held by the Atlas National Bank for the sum of fifteen thousand dollars and the giving of a note therefor, said note to contain a warrant of attorney to confess judgment at any time after the date thereof. This resolution, adopted at said directors' meeting, at which Wilson, Bayless, Warvelle, Halbe, Noyes, and Tillotson were all present, recites that the bank held notes and mortgages of Wilson & Bayless aggregating the sum of seventeen thousand dollars; that the same are pledged to the bank by Wilson & Bayless to secure the bank for advances made to them. It also recites that the bank has offered to sell the same for fifteen thousand dollars to the company, and that it was expedient, and for the best interest of the company, to accept the proposal. Accordingly, on the following day, the 14th of November, a judgment note for fifteen thousand dollars was duly prepared, and executed under the seal of the corporation, by virtue of this resolution, and a copy of the resolution was made and certified by the secretary, and both were given to the attorney for the corporation, and that attorney, Warvelle, delivered the same to the bank, under the arrangement that had previously been made.

534 At the time of the delivery of the said fifteen thousand dollar judgment note to appellant the notes, mortgages, and leases that had been executed by the customers of the firm of Wilson & Bayless, and by said firm pledged to the bank, were not delivered to Warvelle, nor were they in fact ever delivered to the Wilson & Bayless Company. They were afterward, on or about the 5th of December, 1888, delivered to Halbe, not upon the order of the corporation, but upon a written order of the firm of Wilson & Bayless, which order was, in substance, as follows:

"CHICAGO, Dec. 5, 1888.

"*Mr. Grannis, Pres't Atlas Nat. Bank,*

"DEAR SIR: Please deliver to bearer, Chas. F. Halbe, all our notes and mortgages now at your vaults, and oblige,

"Yours, respt.,

"WILSON & BAYLESS."

Thereafter Halbe succeeded in collecting one hundred

dollars on these surrendered collaterals, and that one hundred dollars was placed to the credit of the firm of Wilson & Bayless.

From time to time after the 15th of November the nine notes, representing the ten thousand dollars of the firm indebtedness to the bank, fell due and were replaced by the notes of the Wilson & Bayless Company, the transactions being substantially this: One of the firm, generally Wilson, would come into the bank with the check of the company for the amount of the firm note, pay it in, and immediately, as a part of the same transaction, discount a company note for a like amount, this being the method resorted to by the parties for the substitution of a company note for the firm indebtedness without the payment by the bank to the company of any consideration therefor.

On the sixteenth day of November, 1888, the firm of Wilson & Bayless made a note for fifteen hundred dollars, and appellant discounted that note, and placed the proceeds to the credit of the firm. Excluding the transactions by means of which notes of the Wilson & Bayless Company were substituted for notes of the firm of Wilson & Bayless, in one ~~535~~ instance only was any money loaned by appellant to the corporation organized as the Wilson & Bayless Company, and that was a loan of one thousand dollars, made on the twenty-first day of February, 1889.

On the 9th of March following such had been the transactions between the company and the bank that the bank then held its notes for eleven thousand five hundred dollars, the net amount then due to it, and on that day the bank discovered that the company were swapping checks, and being alarmed thereby, caused judgment to be entered upon the judgment note for fifteen thousand dollars in the superior court of Cook county. Shortly thereafter its attorney, discovering, as appellant claims, that the judgment note so held was held as collateral security, and that the total amount of the indebtedness owing to the bank by the company was eleven thousand five hundred dollars, entered a *remittitur* reducing the judgment to that amount. Execution was duly issued and levied upon the stock of the company on the 9th of March. Four days later, and on the 12th of March, the corporation made a voluntary assignment, the assignee in the deed of assignment being left blank and unnamed, but the trust was accepted by Marshall D. Talcott, who duly

qualified as assignee thereunder. Talcott was afterward succeeded by Clare E. More, the present assignee.

Talcott, as assignee, applied to the county court of Cook county for an order on the sheriff to turn over to him, as assignee, the property levied on under the execution and held by said sheriff, and on the thirteenth day of March, 1889, by agreement made in open court and entered of record by and between the assignee and the Wilson & Bayless Company, and Wilson and Bayless individually, and the Atlas National Bank of Chicago, and various creditors, it was ordered that the sheriff deliver and turn over to the assignee all the property levied on by the sheriff, and in his possession under and by virtue of the execution in favor of the appellant bank and against the Wilson & Bayless Company, and said order ⁵³⁰ provided as follows: "That the rights of said sheriff and of said judgment creditors under and by virtue of said judgments and the executions levied upon said property, if any exist, are hereby fully preserved to said sheriff and to said judgment creditors, subject to the further adjudication and determination of this court with respect to said rights and liens, if any exist; that said judgment creditors, and each of them, have in this court the same right to be paid out of said property, or the proceeds thereof, that they would have if said property was not turned over to said assignee; that neither of said creditors shall be considered as having waived any lien on said property, or any part thereof, or the proceeds thereof, and that the rights of all the parties be adjusted in this court on the basis of the legal and equitable standing of the parties existing before this order was made."

The assignee sold and disposed of the property of the insolvent corporation, and realized therefrom about twenty-eight thousand dollars. Thereupon the appellant bank petitioned the county court for an order on the assignee to pay the bank its judgment. The assignee filed an answer to this petition, and some seventy-six creditors of the insolvent corporation also filed answers, and they objected to the payment of the judgment of appellant, on the ground that the judgment note on which it was based was given for a debt of the firm of Wilson & Bayless, and not for the debt of the corporation, and that it was given without consideration, and was therefore void as against the claims of the creditors of the corporation, and that the execution created no lien upon the property levied upon, as against such creditors. The

county court entered a decree allowing the claim of the appellant bank to the extent of eleven hundred and six dollars and sixty cents only, said sum being for the one thousand dollars loaned by the bank to the corporation on the twenty-first day of February, 1889, with interest thereon, and certain costs of suit in and about the entry of judgment, etc. On an appeal to the appellate court this decree was affirmed, and a further appeal brought the record here.

537 In the view that we take of the case it is necessary to consider two, and only two, questions. The first of these questions is jurisdictional. Did the county court, under the facts of the case, have full equity power and jurisdiction to hear and determine the controversy involved in the record? The contention of appellant is, that when it presented to the county court the record of its judgment recovered in the superior court of Cook county, and no want of jurisdiction was shown, such record imported absolute verity, and when followed by an execution, with due proof of a levy, the appellant had an absolute lien, which the county court was bound to protect and enforce, unless either it was void as a preference under the Voluntary Assignments Statute, or some defense arising subsequently to the entry of judgment was shown, such as a vacation or removal of the judgment, or payment thereof, or the like. The claim, stated in other language, is, that the county court was neither a court of review nor a court of chancery, and had no right to go behind the judgment for any purpose.

The county court did not, and indeed could not, assume to review or reverse for error the judgment of the superior court. That which it did by its decree was to determine that the lien of the execution upon the property covered by the assignment and in the possession of the assignee, and subject to its order and supervision, was not a valid lien as against the creditors of the corporation that made the assignment, except as to the sum of eleven hundred and six dollars and sixty cents. In fact, the county court in its decree expressly recognized the continued existence of the judgment as a judgment, and to the extent above indicated protected and enforced the execution and levy based thereon. Suppose the case to be that the insolvent corporation, prior to the assignment, fraudulently conveyed some of its property to a third party. Then, in that event there is nothing in the decree of the county court that would prevent appellant from

suing out an *alias fieri facias*, ⁵²⁸ and, upon its being returned *nulla bona*, filing a creditor's bill predicated upon the judgment of the superior court.

It is true that the county courts of this state have no general chancery jurisdiction and powers, and also true that the Voluntary Assignments Act confers no such jurisdiction and powers: *Preston v. Spaulding*, 120 Ill. 208; *Ides v. Sayer*, 129 Ill. 230. But it is equally clear that by section 14 of the act full authority and jurisdiction are conferred upon county courts to execute and carry out the provisions of the act, and that in doing so they are clothed with both legal and equitable jurisdiction over the assigned estate, and may exercise both legal and equitable powers in relation thereto: *Field v. Ridgely*, 116 Ill. 424; *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584; *Ides v. Sayer*, 129 Ill. 230; *Plums etc. Mfg. Co. v. Caldwell*, 136 Ill. 163; 29 Am. St. Rep. 305.

In the case at bar, by agreement of appellant and all parties in interest, an order was entered of record in the county court, by virtue of which the property upon which appellant's execution had been levied was surrendered to the assignee, and such order and surrender were expressly made subject to the further adjudication and determination of that court, with respect to the rights and liens of appellant, if any such existed; and it was further stipulated in the order by appellant and the other parties that the rights of all the parties should be adjusted in said county court on the basis of the legal and equitable standing of the parties existing before the order was made. Moreover, appellant afterward presented to said county court its petition, whereby it submitted to the consideration and decision of that court the matter of its legal and equitable rights in the premises. It is manifest that the county court had full and complete jurisdiction both of the subject matter and of the persons of appellant and the other parties in interest, and that, in administering upon the property and fund committed to its supervision, it had power and authority to adjudicate ⁵²⁹ and determine both the legal and the equitable rights of the respective parties in the controversy.

Another question demands our consideration. Is the lien of the execution issued on the judgment of the bank a valid lien upon the property of the insolvent corporation and the fund arising from the sale thereof, as against the claims and demands of the creditors of such corporation?

The appellate court, in its opinion in this case, said: "November 13, 1888, the corporation made to the bank its judgment note for fifteen thousand dollars. The real purpose of the note was to secure to the bank the debt the firm owed, and, vaguely, future advances to somebody; but, as an ostensible consideration, the bank sold to the corporation the paper in the box of the nominal amount of seventeen thousand dollars, on which the firm, not the corporation, afterward collected about one hundred dollars. It is not necessary to state at large the evidence that proves that this sale was a mere pretense, adopted in casting about for a consideration, as a cloak for the real purpose of the note."

In our opinion the evidence in the record fully justifies the language above quoted. At the time the note was made and delivered the corporation was not, and never had been, indebted to the bank. The evidence shows that the notes, mortgages, and leases that were in the tin box at that time were almost entirely worthless, and represented the accumulated losses of the firm of Wilson & Bayless during the whole time they had been engaged in the furniture business, and we are satisfied, from the evidence, that the president of the bank had knowledge of the substantial worthlessness of said securities at the time that he demanded of Wilson and of Warvelle that the corporation should execute its judgment note for fifteen thousand dollars as collateral security for the debt due the bank from the firm. Warvelle stated at the time that he did not see how the company could give a note that would possess any validity, because the company was not indebted to ⁵⁴⁰ the bank, and thereupon it was agreed that the bank should turn over to the company the notes, mortgages, and leases in the tin box as a consideration for the judgment note of fifteen thousand dollars, to be executed by the company. Warvelle says in his testimony: "Ostensibly, I presume, the company was to buy these notes and mortgages. I told Grannis that it would be necessary to have a directors' meeting before we could do any thing, and the directors would have to authorize the execution of this note. So it was further agreed that we should have a meeting that night." And he further says: "The chattel mortgages were simply put in as a consideration for the note—whether real or apparent I don't like to answer. I do not want to stultify myself in any way."

Both Wilson and Bayless were directors of the company,

and both had a personal interest in being released from their personal liability for the ten thousand dollars of indebtedness to the bank, and in having that debt imposed upon the corporation. Halbe was another director, and was also the book-keeper of the firm, and, as he testifies, was willing to do whatever Wilson and Bayless wanted him to do, regardless of any view that he might have of the right or wrong of so doing. Warvelle was their attorney, and was also a director, and seems to have looked at matters very much as Halbe did. Tillotson, another director, was the general book-keeper of the bank, and appears to have been placed upon the board for the express purpose of furthering the desires and interests of appellant. And it follows, as a matter of course, that the arrangement made between the president of the bank and Wilson and Warvelle was immediately ratified by the board of directors.

But the real fact is, the collaterals in the tin box never were delivered to the corporation, and it never realized a single cent in money therefrom. As we have heretofore seen, said collaterals were delivered to the book-keeper and agent of the firm upon a written order signed ⁵⁴¹ by the firm in its firm name. Said order asked for the delivery to the bearer of "all our notes and mortgages." The firm, by giving the order, and the bank, by accepting it, and complying with its request, recognized the fact that said collaterals were still the property of the firm of Wilson & Bayless, and, as we have also seen, all the money that was afterward collected upon them was placed to the credit of the firm, and not to the credit of the corporation. It is not to be wondered at that the appellate court arrived at the conclusion that the sale was a mere pretense, adopted in casting about for a consideration, as a cloak for the real purpose of the note. Indeed, that the supposed sale was a mere sham was virtually admitted by Grannis, the president of the appellant bank, when he testified at the hearing as follows: "This note [the fifteen thousand dollar judgment note] was to be held as collateral security for the then existing debts of Wilson & Bayless, and any such money as the bank would let them have in the future." And that it was a mere sham was also clearly indicated by the conduct of the bank in first entering a judgment for fifteen thousand dollars upon the note, and three days thereafter reducing said judgment to eleven thousand five hundred dollars, the exact amount of the then

indebtedness of the firm of Wilson & Bayless to the bank, plus the one thousand dollars loaned to the corporation itself.

Equity regards the property of a corporation as a fund held in trust for its stockholders while it is solvent, and in trust for the payment of its debts when it becomes insolvent; and if others than *bona fide* creditors of the corporation or purchasers possess themselves of it, then, in case the corporation is or becomes insolvent, they hold it charged with a trust in favor of its creditors, and such trust a court of equity will enforce against them: *National Trust Co. v. Miller*, 33 N. J. Eq. 155, and authorities there cited; *Bouton v. Dement*, 123 Ill. 142; *Beach v. Miller*, 130 Ill. 162; 17 Am. St. Rep. 291.

⁵⁴² It is provided in section 4 of the Statute of Frauds that every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the intent to disturb, delay, hinder, or defraud creditors, shall be void as against such creditors. Whenever a judgment or decree is procured through the fraud of either of the parties, or by collusion of both, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained: 2 Freeman on Judgments, sec. 336; 1 Black on Judgments, sec. 293. A judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment debtor: *Palmer v. Martindell*, 43 N. J. Eq. 90; *Shallcross v. Deats*, 43 N. J. L. 177. A third party whose rights are affected may prove that there was no debt due from the judgment debtor: *Henderson v. Thornton*, 37 Miss. 448; 75 Am. Dec. 70; *Bergman v. Hutcheson*, 60 Miss. 872. A collusive judgment is open to attack whenever and wherever it may come in conflict with the rights or the interest of third persons; and fraud is not a thing that can stand, even when robed in a judgment: *Smith v. Cuyler*, 78 Ga. 654. See, also, *Freydendall v. Baldwin*, 103 Ill. 325.

It is urged that the transaction here under investigation cannot be questioned by the Wilson & Bayless Company, or its assignee, or its creditors, because the notes, mortgages, and leases which were the consideration for the fifteen thousand dollar judgment note are retained. It is a sufficient answer to this claim to say, that neither the corporation nor

its assignee can well retain that which neither of them ever had in possession.

We find no error in the record. The judgment of the appellate court is affirmed. —

CORPORATIONS—PROPERTY AND STOCK AS TRUST FUND.—The capital stock and other property of a corporation constitute, as between creditors and stockholders, a trust fund for the payment of its debts: *Missouri etc. Smelting Co. v. Reinhard*, 114 Mo. 218; 35 Am. St. Rep. 746, and note.

JUDGMENT.—WHEN MAY BE COLLATERALLY ATTACKED.—A judgment or decree obtained by fraud and collusion of the parties to it, for the purpose of defrauding a third person, may be attacked by him in a collateral proceeding: *Ogle v. Baker*, 137 Pa. St. 378; 21 Am. St. Rep. 886, and note. This identical proposition will be found discussed in the extended notes to *Greene v. Greene*, 61 Am. Dec. 468, and *Morrill v. Morrill*, 23 Am. St. Rep. 118.

JURISDICTION OF COUNTY COURTS in Illinois over assignments for the benefit of creditors: See *Plume etc. Mfg. Co. v. Caldwell*, 136 Ill. 163; 29 Am. St. Rep. 305.

CHICAGO v. VAN INGEN.

[152 ILLINOIS, 624.]

THE DEDICATION TO PUBLIC USE OF A RIVER AND THE LAND COVERED THEREBY, except for the purposes of navigation, will not be presumed from the fact that the owner made and filed a plat subdividing his lands into lots and blocks, and on such plat represented the river as between parallel lines, and in the space between such lines wrote the name of the river.

BOUNDARIES.—A GRANT OF LAND BORDERING UPON A RIVER carries the exclusive right and title in the river to the center thereof, subject to the right of passage in the public, unless the terms of the grant specially indicate an intention on the part of the grantor to confine the grantee to the edge or margin.

A RIPARIAN PROPRIETOR HAS THE RIGHT TO BUILD A DOCK OR WHARF from his lot out to the point of navigability, provided he does not interfere with the rights of others or create a public nuisance, nor violate such general rules and regulations as may have been lawfully imposed to preserve and protect the public rights.

BOUNDARIES.—IF TOWN LOTS ARE SOLD AND CONVEYED BY A MAP REPRESENTING THEM AS FRONTING UPON A STREAM of water or designating such stream as one of their boundaries, the purchaser becomes the owner of the fee to the center of the stream, with the right to maintain docks or wharves out to the line of navigability. Of this right he cannot be divested without compensation first being made.

RIPARIAN PROPRIETOR—DOCK PRIVILEGES, REVOCATION OF.—If a riparian proprietor obtains from a municipality a permit to construct a dock out to a designated line in front of his premises in consideration of a conveyance made by him, and enters upon the construction and improve-

ment in reliance upon such permit, and the municipality undertakes to revoke it while retaining his conveyance, and to prevent him from prosecuting his improvements, an injunction may issue to prevent such revocation and the interference by the municipality with such improvements.

Adolph Kraus and Sigmund Zeisler, for the appellant.

David Fales, for the appellee.

627 **SHOPE, J.** It is claimed by appellant that the space between the parallel lines designated on the plat of Fullerton's third addition to Chicago as the "North Branch of Chicago river," was, by the plat, dedicated to the public as a highway for navigable purposes; that appellee's lots terminated at the platted line, and that he had, therefore, no right, in the construction of his dock, to extend the same over and across the line thus designated; that by the platting of the land hereinafter described into lots, blocks, streets, alleys, and railroad right of way, and the acknowledgment and recording thereof, there was a valid dedication under the statutes (Rev. Stats., c. 109, "Plats"), by the proprietor, of the space between the parallel lines aforesaid, purporting to embrace that portion of the North Branch of the Chicago river so as to vest the fee thereto in the municipality for public uses. As we view this record neither of said contentions can be sustained. The city admitted, in its answer to the original bill, that the complainant was "the owner of the bed 628 of the river to the center line thereof, opposite and adjacent to said lots 8 to 14, inclusive, . . . subject to the right of navigation," etc. This admission of the answer is borne out by the testimony of Fullerton, the original proprietor, and by the certificate of the surveyor to the plat of said addition, introduced in evidence. That certificate is as follows:

"I, Samuel S. Greely, do hereby certify that I have surveyed that part of the northeast quarter of section 31, town 40 north, range 14 east of the third principal meridian, lying east of the North Branch of the Chicago river, and that I have subdivided the same into lots, blocks, streets, alleys and railroad right of way, all of which is correctly represented upon the plat hereon drawn.

"Chicago, February 8, A. D. 1882.

"SAMUEL S. GREELY, Surveyor."

It will be at once observed that the survey, subdivision,

and platting were only of that part of the quarter section "lying east" of the river, and it cannot be pretended, the correctness of said certificate not being questioned, that the river was surveyed, and formed a part of said subdivision as a proposed highway. By fair inference, at least, the subdivision of the land only into lots, blocks, streets, alleys, and railroad right of way carried the area of lots platted to the river. True, there is a line upon the plat, presumably drawn to follow the general trend of the northeasterly edge of the river, paralled with a like line on the opposite southwesterly side of the stream, and the cross bill of the city alleges that the North Branch of the Chicago river is wholly within the territorial limits of said city, and subject to its jurisdiction, and that it is entitled to receive and accept dedications of property for highway purposes; yet, in the absence of evidence showing that the river formed a part of said subdivision, and was accordingly platted as a proposed highway for the public, no authority need be ⁶²⁹ cited to show that the court cannot presume, as against adjacent lotowners, that there was a dedication of the river to the public use by the mere fact of its exclusion from such survey and subdivision, and that it is designated on the said plat of the proprietor, between the parallel lines, as the "North Branch of Chicago river." The proprietor dedicated nothing to the general public save streets and alleys, and left the river without any dedication thereof, except as might be presumed or inferred from his subdivision of the land adjacent, and the exclusion of the river from such subdivision by the parallel lines above mentioned. It would therefore seem clear that, the river not having been disposed of in the making of the subdivision, no intention on the part of the proprietor to confine adjacent subsequent lotowners to the said parallel lines is indicated by the said plat, and it is fair to presume that if the proprietor intended dedicating the river, as land, to the public, he would have done so in the mode prescribed by the statute, and as a part of his scheme of subdivision.

Conceding, however, that the purpose of the proprietor in omitting the river from the subdivision was to leave it out for user by the public, and that the parallel lines were simply drawn as boundaries with reference to such user, it is not to be presumed that a dedication of the land within said lines was intended. The purpose, undoubtedly, as shown by the testimony of Fullerton himself and witness Carlson, of the

Greely-Carlson Company, that made the said subdivision, was to provide for a highway by water, and that the parallel lines were intended to indicate, at most, the river as it would be when improved. Fullerton, upon this point, testified that the purpose of the plat showing the river was to show the river as it would be when improved. Carlson, that the space between the parallel lines "was the part to be occupied by the river when improved." The river, at the time of said subdivision, being, as shown by the ⁶³⁰ evidence, navigable part way up at that place, the proprietor, naturally supposing that the river would be improved for navigation, left the same out of the subdivision, but did not give the land covered by water or embraced within the parallel lines to the public as a highway. The fee was left in the adjacent owners to the center of the stream, and by said parallel lines the said proprietor indicated the easement of the public, as nearly as practicable, in the stream when improved for that purpose. It is therefore apparent, the answer of the city conceding the fee to the center of the river to be in appellee, that until the public, by due process of law, divested him of his riparian rights therein, or by improvement or otherwise, in compliance with law, made the river coincide with the said platted parallel lines, appellee, under proper regulations of the city, would have the right to build a dock, so as to have the benefit of the navigable part of the stream.

It is clear that the admission in the answer was in accordance with the facts, and the legal effect, no attempt having been made to include the river in the subdivision, and thereby dedicate it to public use, is, that appellee's lots were bounded by the river, and not by the arbitrary line. An extended discussion of the testimony will be unnecessary, and it will suffice to say, that in our opinion the record fails to show a dedication of the river as a highway, within the meaning of section 1, chapter 109, of the Revised Statutes, even if it be conceded, as contended, that said section may be construed to apply to streams dedicated to public use in the same sense as "land" dedicated to such use.

But it is contended that by the description of said lots in the deed from Fullerton to appellee the boundary thereof was limited to the platted line, by the language referring to said lots as "lying east of the North Branch of the Chicago river, according to map recorded in the recorder's office of Cook county," etc. This cannot be ⁶³¹ regarded as material,

for the reason, as we have seen, that the river was no part of the subdivision, and that the parallel lines were placed on said map for the sole purpose of indicating where the river would be when improved. The grantor in the deed, the consideration of which was eighty-five thousand dollars, evidently did not intend said platted line to be the southwest boundary of said lots, else it is probable he would have said so in his deed. Nor can it be supposed that by such language his intention was to render the property, especially valuable for dock purposes, of undoubtedly much less value for such purposes. The consideration expressed in the deed does not so indicate, and appellee did not so understand it. In answer to the question, "What do you understand this line, that lies inside of, or rather easterly of, the permit dock line, to be?" appellee testified: "I should suppose that to be the west line of the property that had been sold up to the river. That was what was the shore line, subject to the rights to the center of the stream." It therefore seems clear that while the platted line might have been regarded, in a sense, as the lot line, it was not so by reason of any express dedication of the land and water beyond it, but as only indicating the line of the river if improved, and that the grantee, until such time, owned to the center of the stream.

The question therefore remaining for determination is, whether appellee had the legal right to construct a dock at the place he designed and undertook to build it. Since 1888 the city, nearly every year, as appears from the evidence, has done more or less dredging, and improved the navigability of the river, and the stream having been thus rendered more suitable for traffic and commerce by navigation, the land of appellee became correspondingly more valuable for dock purposes. A considerable portion of appellee's lots at places projected into the river, and the water was quite shoal, so that in order to build his dock within access of the navigable channel, which lay some distance away and along the opposite shore, appellee was compelled to do a large amount of excavating and dredging. It appears, also, that there was no attempt by appellee to build his proposed dock, to any appreciable extent, beyond the water line. True, for a very short distance on lot 8, owing to the irregularity of the water line, the contemplated dock would extend out upon the shoal water; but at the north and south ends of lot 8, and midway the dock line in front of lot 9, the bank extended a consider-

able distance west of said dock line into the river, and would have to be removed to admit of approach to the dock. At lots 10, 11, and part of 12 the water line was back of the dock or platted line, practically one-fourth the length of the lots. It was contemplated that the dock would be rendered accessible only by dredging and widening the river, and, in order to secure access to and benefit of the navigable part of the stream, permission to build the dock on the "permit dock line," and extend the north end out toward the river some twenty-seven and one-half feet, was sought for by the one party and granted by the other.

In *Chicago v. McGinn*, 51 Ill. 266, 2 Am. Rep. 295, it was expressly held that the water and bed of the Chicago river are the common property of the riparian owners, subject only to an easement of the public for the purpose of navigation. The question, however, as to whether the North Branch of the Chicago river is navigable does not arise in this case, as it is admitted on both sides to be so, and, it appears, was so regarded by abutting owners and the public authorities. While it does not appear that the space indicated on the Fullerton plat as the North Branch of Chicago river, presumably to the width of one hundred and eighty feet, was dedicated to the public as land, it was, we think, clearly the intention of the proprietor, in platting the lands on each side into lots, blocks, etc., to leave the watercourse for the use of the public for purposes ⁶³³ of navigation, and it is also clear that the city, on behalf of the public, accepted the same and assumed jurisdiction and control over it. Thus, at the time of the purchase of said lots by appellee, the river had been improved so as to be navigable for craft to within from three to five hundred feet of his property, and subsequently, and before the attempted erection of said dock, the channel had been dredged and deepened to a point north of his property. The city had passed ordinances regulating the building of wharves, docks, etc., and providing that certain of its officers might grant permits to riparian owners to construct the same, and had otherwise assumed supervisory control and jurisdiction of the watercourse and approaches to it.

There being nothing in this record, as we view it, on the part of Fullerton in making said subdivision and plat and leaving the river as a waterway for the public, nor in his said deed to appellee, manifesting an intention to preclude the fee to the center of the stream, or the riparian rights of adja-

cent owners, it may be said, as in *Canal Trustees v. Haven*, 11 Ill. 554: "By the common law a grant of land bordering on a highway or river carried the exclusive right and title in the highway or river to the center thereof, subject to the right of passage in the public, unless the terms of the grant clearly indicated an intention on the part of the grantor to confine the grantee to the edge or margin." There was, in the case at bar, no limitation upon appellee's dominion or ownership in the premises upon which the dock was to be built, save ordinances and regulations of the city imposed for the protection of the public rights, as no contrary intention is shown by said subdivision and plat or by the deed to appellee. He had the exclusive right and title to the center of the river, and the only restriction upon him as to the distance out he should build his dock was the point of navigability, and that the dock be so confined to the shore as not to interfere with the rights of others or become a ⁶³⁴ public nuisance, and constructed subject to such general rules and regulations as may have been lawfully imposed to preserve and protect the public rights: *Dillon on Municipal Corporations*, 2d ed., sec. 70; *Dutton v. Strong*, 1 Black, 25; *Railroad Co. v. Schurmeier*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Chicago v. Laflin*, 49 Ill. 172; *Ensminger v. People*, 47 Ill. 384; 95 Am. Dec. 495.

Dillon on Municipal Corporations, section 70, says: "By the common law the riparian owner has the right to establish a wharf on his own soil, this being a lawful use of the land. The right is judicially recognized in this country, and riparian proprietors on ocean, lake, or navigable river have, in virtue of their proprietorship, and without special legislative authority, the right to erect wharves, quays, piers, and landing places on the shore, if these conform to the regulations of the state for the protection of the public, and do not become a nuisance by obstructing the paramount rights of navigation. . . . The right terminates at the point of navigability, unless special authority be conferred, for at this point the necessity for such erections ordinarily ceases." And practically the same language was used in *Dutton v. Strong*, 1 Black, 25.

In *Yates v. Milwaukee*, 10 Wall. 497, it was insisted that the premises there in question were dedicated to the public by the fee-owners as a highway by water, and that the defendant city had the right to remove the wharf maintained by the

plaintiff upon his adjacent lot, and the court there held: "Whether the title of the owner of such lot extends beyond the dry land or not he is certainly entitled to the rights of the riparian proprietor whose land is bounded by a navigable stream. Among these rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf, or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be." The same ⁶³⁵ principle was followed in *Chicago v. Laflin*, 49 Ill. 172, where it was held that, subject to the easement of the public over and upon the navigable portion of the stream, the adjacent proprietor was the owner *usque ad filum aquæ*, and that he would have the right to use and enjoy the same as his own in any lawful manner, provided he did not thereby impair or obstruct the easement of the public.

Further examination and citation of authorities will be unnecessary. It is clear, the boundary of appellee's lots not being restricted, by the terms of his deed or by dedication of any part of his lots within said parallel line, to such line, that he was owner in fee to the center of the stream, and as a riparian proprietor had the right, subject to proper municipal regulations, to build the proposed dock so as to have the benefit of the navigable channel of the stream.

No question as to the right of the city to establish a dock line at the place here contended for, and widen the channel of the river so as to take the intervening land, under the general powers granted in the Cities and Villages Act to deepen, widen, dock, alter, or change the channel of water-courses, and to erect, regulate, and control wharves, docks, etc., without making just compensation to appellee, is presented upon this record. No attempt was made on the part of the city to establish a dock line at the place in question, by ordinance or otherwise. But it may be said that riparian rights are property, protected by law, and in many instances, as in this, valuable. In respect to such rights, as in all cases where private property is sought to be taken for public use, the owner cannot be divested thereof without just compensation being first made: *Chicago v. Laflin*, 49 Ill. 172; *Yates v. Milwaukee*, 10 Wall. 497; and *Ensminger v. People*, 47 Ill. 384; 95 Am. Dec. 495.

The city, under the power conferred by the general law,

by ordinance placed all work for the widening, deepening, or dredging of the Chicago river and its branches under the supervision and control of the commissioner of ^{§36} public works: Consolidated Ordinance, sec. 558. By other sections of the ordinance the Chicago river and its branches, to their respective sources, are declared to be portions of the harbor of the city of Chicago. Provision is made for the appointment of a harbor master, and all persons engaged in repairing, renewing, altering, or constructing any dock within the city of Chicago are required to produce to the harbor master a permit therefor from the department of public works of the city, specifying the character and location of the work, and in default thereof the harbor master is required to stop the same and cause the arrest of the parties engaged therein, etc. In compliance with the requirements, appellee produced to the department of public works of the city his plans and specifications, showing the character and location of the proposed dock, and thereupon the commissioner of public works gave appellee permission to build the same upon a line indicated on appellee's map as the "permit dock line," and to be completed in the time and manner satisfactory to said commissioner, the permit, however, not to take effect until it bore the certificate of the assistant engineer that the lines of the work had been given. Said permit was subsequently indorsed, certifying that the lines of the work had been given December 23, 1891. The evidence shows that by the lines thus given the dock would extend out at the west corner of lot 8 twenty-seven and fifty-five one hundredths feet west of the line on the said plat, and run thence back southeasterly to the end of the dock in front of lot 12 on said "permit dock line." In consideration of said permit appellee, at the request of the city authorities, executed to the city a quitclaim deed in due form, conveying, for the purposes of navigation, his title and interests in lots 13 and 14, opposite the line of the dock in front of those lots. After the work had progressed to a considerable extent, and appellee had gone to large expense in respect thereof, no complaint having been made or pretense that the work was not being done to the satisfaction ^{§37} of the commissioner of public works or in violation of the permit, the assistant engineer, claiming to act by authority, interrupted the work and undertook to revoke the permit. No reason is shown for this conduct, and the sole ground upon which the city predicates its right to revoke said per-

mit is, that appellee was building his dock over and beyond the platted line, that the land west of such line was dedicated to the public, etc.

What has already been said disposes of this contention. Appellee was constructing his dock on the "permit dock line," or the line given him by the assistant engineer as the front line of his dock. When appellee's permit was taken away he demanded a return of his deed, but this the city refused to surrender to him. What, if any thing, passed by the deed to the city, and the purpose and legal effect of it, are not matters for determination here. As it appears from the evidence that the making of the deed and granting the permit were contemporaneous, and parts of the same transaction, each was a sufficient consideration for the other, and presumably, at least, secured rights mutually advantageous. It is not shown or pretended that the construction of the proposed dock, as appellee attempted to build it, would in any way interfere with or obstruct the free use of the river for purposes of navigation, or that the public interests required the premises upon which it was being built to remain unoccupied. On the contrary, the evidence all tends to show that the excavating and dredging by appellee, in the building of his dock, would tend to widen the stream and render it more navigable. No question is raised by the city as to the authority of the officers granting the permit to grant the same, or of their lawful powers in this respect. Nor does it appear that the commissioner of public works—the officer designated by the ordinance to grant such a permit, and to whom alone the power of revocation is reserved in the permit—has ever expressly revoked the same.

638 By granting the permit to appellee in consideration of his deed, and the designation by the officer of the city of lines for the work, appellee was induced to act greatly to his prejudice, if appellant and its officers be allowed to revoke the permit. On the clearest principles of equity we think the city ought not to be permitted so to do.

It will be unnecessary to examine here other questions raised. On the whole, and after a careful consideration and study of this record, we are of opinion that the court below, in awarding a perpetual injunction restraining the city and its officers, etc., from interfering with appellee in the building of his dock and from revoking said permit, decided correctly, and its decree will be affirmed.

DEDICATION TO PUBLIC USE BY MEANS OF PLATS OR MAPS: See the notes to *People v. Reed*, 15 Am. St. Rep. 31; *Weisbrod v. Chicago etc. Ry. Co.*, 86 Am. Dec. 750; *State v. Trust*, 27 Am. Dec. 567, and *Methodist etc. Church v. Mayor*, 97 Am. Dec. 706; also *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772, and note.

WATERS AS BOUNDARIES.—This question is thoroughly discussed in the monographic note to *Allen v. Weber*, 27 Am. St. Rep. 56.

WHARVES. — RIGHT OF RIPARIAN OWNERS TO BUILD TO NAVIGABLE WATER: See the note to *Prior v. Swartz*, 36 Am. St. Rep. 336, 337, and the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 231; also *Lewis v. Portland*, 25 Or. 133; 42 Am. St. Rep. 772, and note.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

GOODBAR v. LIDIKEY.

[186 INDIANA, 1]

WILLS—EVIDENCE OF MENTAL INCAPACITY.—In an action to annul a will on the ground of mental incapacity in the testator evidence that he devised land to which he had no title is admissible to show the condition of his mind as to soundness or unsoundness at the time he executed the will, but not for the purpose of establishing title to such property.

WILLS—UNDUE INFLUENCE.—If by physical or mental superiority one obtains an advantage in a transaction over another who is enfeebled in mind and body, or by disease or old age, the person obtaining such advantage is required to show that the transaction was a fair one; but this rule can apply only to one who was present and actively concerned in bringing about the result complained of, and does not in any degree apply to a will not made with the active participation of the devisee.

WILLS—UNDUE INFLUENCE.—PRESUMPTIONS in favor of the validity of a will, attacked for undue influence, are increased, rather than diminished, from the circumstance that a bequest was made to one with whom the testator maintained intimate and confidential relations during life.

WILLS—CAPACITY—INSTRUCTIONS.—In an action involving the validity of a will an instruction drawing attention to the condition of the mind of the testator, and requesting the jury to consider numerous matters relating thereto, including declarations made by the testator for some time previous to the making of the will, showing that he had long designed to make it as it stands, is correct as affecting the question of capacity to make a valid will.

INSTRUCTIONS to jurors that if they find certain evidence established, certain conclusions may be drawn therefrom, without any suggestion that the facts referred to have been proved, are not open to the objection that they unduly emphasize the evidence.

WILLS—UNDUE INFLUENCE.—DECLARATIONS OF TESTATOR, not made in connection with the execution of his will, are not admissible for the purpose of showing that the will was procured by undue influence; but

declarations made before the execution of the will, when it is executed in conformity therewith, are admissible to show his intentions as to the disposition of his property, and to rebut evidence of undue influence in the execution of the will.

WILLS—UNDUE INFLUENCE.—Undue influence in the execution of a will is not proved by disclosing relations of friendship and affection between the parties, and by showing kindly offices and proper conduct on the part of the devisee toward the testator. To prove undue influence conduct must be shown on the part of the devisee by which freedom of action of the testator was so controlled that the will offered as his cannot be considered as his voluntary act or deed.

T. E. and E. E. Ballard, for the appellants.

P. S. and S. C. Kennedy, B. Crane, and A. B. Anderson, for the appellees.

• **HOWARD, C. J.** This was an action brought by appellants to set aside the will of John N. Goodbar, alleging unsoundness of mind, undue execution, fraud, and duress. There was an answer in general denial, trial by a jury, and judgment for appellees, sustaining the will. The overruling of appellants' motion for a new trial is assigned as error.

Under the assignment of error, counsel for appellants complain of the action of the court in refusing to give certain instructions to the jury, as requested by appellants, and also in giving certain other instructions over the objections of appellants.

• By one item of his will the testator had devised to his sister, Catharine Hostetter, certain real estate. Evidence was introduced on the trial, by appellants, to show that at the time of making his will the testator had no title to the real estate so devised. Against this evidence appellees introduced the record of the proceedings and judgment in a foreclosure suit against the owner of said land, and the assignment of said judgment to the testator. In rebuttal the appellants read in evidence a reassignment of the judgment made afterward by the testator to the said Catharine Hostetter.

• As applicable to the evidence thus introduced the appellants asked the court to give to the jury the following instructions:

"5. The judgment of foreclosure which has been read in evidence cannot be considered by you for the purpose of establishing title in the testator to the land described in such judgment.

"6. A devise of land does not give to the devisee any interest in a judgment of foreclosure rendered against the person owning such land.

"7. If you are satisfied, from the evidence, that the testator, John N. Goodbar, signed and executed the written instrument read in evidence, bearing date of April 20, 1891, then I instruct you that such instrument has the effect to transfer to Catharine Hostetter all the right, title, and interest, which John N. Goodbar had to the judgment of foreclosure described in such instrument."

We think the court properly refused to give these instructions. In so far as the instructions are correct abstract statements of law they are not applicable to the issues before the court.

The case of *Zenor v. Johnson*, 107 Ind. 69, relied upon by counsel, was one involving the ownership of property, and it was correctly held in that case that the court ⁴ should have construed the written contracts upon which the title to the property depended. Here, however, there is no question of trial of title; the issue before the court was as to the capacity of the testator to make a valid will. The evidence offered as to the title to the Hostetter land was competent only in so far as it went to show the soundness or unsoundness of the mind of the testator; and the court, in the instructions given the jury on this evidence, properly charged them that it was to be considered so far as it illustrated the condition of mind of John N. Goodbar as to soundness or unsoundness at the time he executed the will in suit, and not otherwise.

On the issue of undue influence appellants asked the court to give the following instruction: "Where the devisee in a will sustains a confidential relation to the testator at the time of the alleged execution of the will, and where the testator is being cared for by, and is under the protection of, such devisee, and there is in the will a devise of a large amount of property to the devisee sustaining such confidential relation, and if it be shown that, at the time of the alleged execution of the will, the testator's mind was enfeebled by age and disease, even though not to the extent of producing mental unsoundness, then it will devolve upon the devisee to show affirmatively that the will was a free and voluntary act of the testator, and without any improper influence on the part of the devisee."

We think that the rule asked for in this instruction is one

rather applicable to contracts or gifts *inter vivos* than to testamentary devises. But even as to contracts, the instruction seems too broad. It assumes that there was between the testator and one of the devisees a fiduciary relation, as of trustee and beneficiary, principal and agent, attorney and client, guardian and ward, parent ⁵ and child, physician and patient, pastor and parishioner.

It would, besides, be necessary, in order to establish the fact of undue influence even as to contracts, that the one claimed to have exerted the influence should be shown to have had some advantage of superiority or knowledge over the other, and that such superior influence was exerted in the transaction complained of. In this case the transaction complained of, the execution of the will, is not shown to have been in any way participated in by the devisee. Certainly one cannot be called upon to prove that a transaction with which he had nothing to do was a fair one.

It is undoubtedly the law that when, by physical or mental superiority, one obtains an advantage in a transaction over another who is enfeebled in mind and body, or by disease or old age, the person obtaining such advantage will be required to show that the transaction was a fair one. But such a rule can apply only to one who was present and actively concerned in bringing about the result complained of.

In addition the rule which obtains as to transactions between the living must be greatly modified when it comes to testamentary devises. If the will is not made with the active participation of the devisee, then the rule sought to be applied in the instruction cannot obtain in any degree. Surely, one ought not to be incapable of taking a devise simply for the reason that he had been a friend of the testator, or had served him faithfully when living. On such a theory a wife or a child might be suspected of having exerted undue influence over a loving and grateful husband or father, merely because he should be found to have remembered them generously in his will, and that even if the will were made with his ⁶ lawyer alone, in the privacy of his chamber, as was done in this case.

Indeed, we think that the presumption in favor of the validity of a will should be increased rather than diminished from the circumstance that a bequest was made to one with whom the testator had maintained intimate and confidential relations during life. A will, in fact, is usually made in

order to give property to those whom the testator desires to favor. If it were the desire that the property should go in due proportions to those equally related to the testator, then no will would be necessary. The law itself would make such distribution in the most equitable manner possible. This is particularly the case where, as in this case, the testator had neither wife nor children, and his property, if not devised, would go to collateral relations. The real question must be as to the mental soundness of the testator, and whether his mind was in fact unduly influenced in the making of his will; whether it was his will or the will of some one else.

In the *Estate of Brooks*, 54 Cal. 471, it was claimed, as it is in this case, that the devisee, having been a partner of the testator, a presumption of undue influence arose from that relation. The court said: "We think the suspicion of undue influence having been exerted would be much stronger in a case where a testator should give all his property to a stranger than in one where he gives it all to one with whom he was intimately connected, socially and in business, for a great many years immediately preceding his death": See, also, *Wheeler v. Whipple*, 44 N. J. Eq. 141; *Tyson v. Tyson*, 37 Md. 567; *In re Will of Smith*, 95 N. Y. 516; *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904; 1 Redfield on Wills, 537, note; Schouler on Wills, sec. 246.

Instruction 8, as given by the court, is objected to, as are also instructions 9 and 13 for the general reason that the court singles out and emphasizes certain evidence. It is proper to give instructions applicable to the issues, if there is also evidence to which they may apply.

Instruction 8 draws attention to the condition of mind of the testator, and asks the jury to consider numerous matters relating thereto, including declarations made by the testator for some time previous to the making of his will, showing that he had long designed to make the will as it stands. We think these instructions were correct as affecting the question of capacity to make a valid will: *Conway v. Vizzard*, 122 Ind. 266.

We do not think the court unduly emphasized the evidence to which this and the succeeding instructions refer. The jury are told that if they find certain evidence established, certain conclusions may be drawn therefrom; but we do not think there is any suggestion that the facts referred to have been proved. That is left to the jury, as it must be.

Instruction 9 relates to evidence given relative to the title to the Hostetter land, and we have already referred to it. It properly informed the jury that whatever they found the facts to be relating to this matter should be considered only so far as it showed the condition of the testator's mind at the date of his will; and this was the only purpose for which that evidence should be considered.

That part of instruction 13 complained of is as follows: "And as further bearing upon the question of undue influence, if you find that months before the execution of the will, when in good health, and of unquestioned soundness of mind, the testator declared, in the absence of De Pew Hyten, that he intended to do a good part by De Pew Hyten, or pay him well for attentions and kindnesses bestowed, or give him a home; and if ^s you further find that the bequest to De Pew Hyten is in substantial compliance with such declaration, you should consider this fact in determining whether or not De Pew Hyten used undue influence in procuring the bequest made to him."

It is well settled that the mere declarations of a testator, not made in connection with the execution of the will, are not admissible for the purpose of showing that the will was procured by undue influence. Such declarations must be treated as hearsay: *Hayes v. West*, 37 Ind. 21; *Todd v. Fenton*, 66 Ind. 25; *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433; *Conway v. Vizzard*, 122 Ind. 266.

But it is quite otherwise when a will is to be defended against an assault by one who claims that it was executed through undue influence. In such case the declarations of the testator, made before the execution of the will, are admitted by way of rebuttal, to show his intentions as to the disposition of his property. Where the will is made in conformity with the repeated declarations of the testator it is more likely to have been executed without undue influence than if found contrary to such declarations: *Bundy v. McKnight*, 48 Ind. 502; *Lamb v. Lamb*, 105 Ind. 456; 1 Redfield on Wills, 568; Schouler on Wills, sec. 243; *Roberts v. Trawick*, 17 Ala. 55; 52 Am. Dec. 164; *Gardner v. Frieze*, 16 R. I. 640.

Instruction 12, also given by the court, is objected to as tending too strongly to show that a presumption of undue influence does not necessarily arise from social or family relations; as that the testator lived with the devisee, was treated kindly by him, was nursed in sickness, and his wants

provided for. From what we have already said in considering the instruction upon the subject of undue influence, requested by appellants, and refused by the court, we do not think this instruction incorrect. It states to the jury, substantially that undue • influence is not proved by disclosing relations of friendship and affection between the parties, and by showing kindly offices and proper conduct on the part of the devisee. This was correct. If unkindly relations were shown toward the testator, and the devisee, notwithstanding his harsh treatment of the testator, should be found to have been favored in the will, then we might much more reasonably suspect undue influence. To prove undue influence some conduct must be shown on the part of the devisee by which the freedom of action of the testator was so controlled that the will offered as his cannot be considered as his voluntary act or deed.

We have found no error in the record, and the judgment is affirmed.

McCABE, J., took no part in the decision of this case.

WILLS—UNDUE INFLUENCE—BURDEN OF PROOF.—When a confidential relation is shown to exist between a testator and the recipient of his bounty his influence is presumed to have induced the bequest, and the burden of proof is cast upon the beneficiary to explain the transaction and establish that it is reasonable: *Maddox v. Maddox*, 114 Mo. 35; 35 Am. St. Rep. 734, and note. See, also, the extended note to *In re Hess' Will*, 31 Am. St. Rep. 670.

WILLS—UNDUE INFLUENCE—EVIDENCE.—DECLARATIONS OF TESTATOR: See *Haines v. Hayden*, 95 Mich. 332; 35 Am. St. Rep. 566, and note, and *In re Hess' Will*, 48 Minn. 504; 31 Am. St. Rep. 665, and the extended note thereto at page 690.

WILLS.—TESTAMENTARY CAPACITY, and the various questions as to undue influence invalidating wills, were discussed in *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828, and note, and the extended notes to *In re Hess' Will*, 31 Am. St. Rep. 670, and *Richmond's Appeal*, 21 Am. St. Rep. 94.

KING v. CARMICHAEL.

[126 INDIANA, 20.]

COTENANCY—ADVERSE POSSESSION.—A cotenant who, under color of title, enters into possession of the land held in common, claiming the whole to himself, thereby acquires an adverse possession, and sets the statute of limitations in operation.

COTENANCY—CONVEYANCE BY ONE—ADVERSE POSSESSION.—A cotenant who sells and conveys the whole of the land held in common and gives possession thereby creates in the grantee a title and possession adverse to the other cotenant or cotenants, and if such grantee continues to hold for the period of time prescribed by the statute of limitations he thereby acquires a good title as against them.

STATUTE OF LIMITATIONS—DISABILITY—REMOVAL OF.—The statute of limitations begins to run as to persons under legal disability, when the action accrues, but, if it has fully run before the disability expires, an action may be brought within the time limited by statute after the disability is removed. The phrase "legal disability" includes infancy.

ADVERSE POSSESSION—NOTICE—STATUTE OF LIMITATIONS.—Undisturbed adverse possession of land under color of title raises a presumption of notice thereof, and constitutes a complete bar to an attack upon the title of the party in possession after the period prescribed by the statute of limitations has elapsed.

G. H. Koons, for the appellant.

W. W. Orr, J. N. Templer, and E. R. Templer, for the appellee.

20 DAILEY, J. This is an action brought by the appellee against the appellant, in the Delaware circuit court, to quiet title to certain real estate described in the complaint, and for an injunction. The appellant appeared and filed an answer, in two paragraphs, and a cross-complaint against the appellee in two paragraphs. The appellee filed her reply to the second paragraph of the appellant's answer, in four paragraphs, and her answer to the cross-complaint of appellant in four paragraphs. The replies are addressed to the second paragraph of the appellant's answer, and are numbered 1, 2, 3, and 4. The paragraphs of answer are addressed as follows. viz: The first, third, and fourth to both paragraphs of the cross-complaint, and they are numbered 5, 7, and 8; the 21 second is addressed to the first paragraph of the cross-complaint, and is numbered paragraph 6.

The appellant demurred to the second, third, and fourth paragraphs of the reply, and also to the second, third, and fourth paragraphs of answer to the cross-complaint. The court overruled all these demurrers. The appellant replied to the

second, third, and fourth paragraphs of answer to the cross-complaint by the general issue. There was a trial by the court, and finding and judgment for the appellee. The appellant filed and submitted his motion and written reasons for a new trial, which at the next term was refused, and the court rendered a judgment and decree for the appellee, from which the appellant prosecutes this appeal.

Errors are assigned upon the overruling of appellant's demurrer to the second, third, and fourth paragraphs of reply, also upon the overruling of the demurrer to the second, third, and fourth paragraphs of answer to the cross-complaint, and upon the overruling of appellant's motion for a new trial.

Appellant has not brought the evidence before the court, and has not submitted any argument in support of his assignment of error upon the overruling of his motion for a new trial, and we assume that the alleged error is waived: *Louisville etc. Ferry Co. v. Nolan*, 135 Ind. 60; Elliott's Appellate Procedure, sec. 444, note 3, and authorities there cited.

We will consider the errors assigned upon the overruling of the appellant's demurrers to the second, third, and fourth paragraphs each of the replication and answer to the cross-complaint. These are so similar and so intimately connected in principle and theory, that, as a matter of convenience, we will view them together.

The second reply to the second paragraph of the answer alleges in substance that one Lydia J. King, wife ²² of Lemuel King, died intestate, in Delaware county, Indiana, on March 23, 1865, seised in fee simple of the real estate described in the second paragraph of the answer, leaving surviving her said Lemuel King and a son, Francis J. King, as her only heirs at law, to whom said premises descended in fee simple; that afterward, on the eighth day of December, 1865, said Lemuel, believing that he had inherited one equal half part of said real estate from his said deceased wife, sold and, by warranty deed of that date, conveyed one equal half thereof, with other real estate, to Thomas Tate, for nine hundred and thirty-seven dollars and fifty cents, the then full cash value thereof, then paid to and received by him from Thomas Tate, and then and there, under and pursuant to said deed, the said Lemuel King put the said Tate into full possession of the real estate so sold, conveyed, and purchased, and the said Tate then and there, on said eighth day of December, 1865, took and ever since, by himself and his

grantees, has held, and plaintiff, as a remote grantee of said Tate, holds full, open, notorious, and exclusive adverse possession of the same under claim of ownership thereof; that afterward, on January 8, 1866, Lemuel King was duly appointed, gave bond, and qualified as guardian of appellant, and as such guardian made his sworn petition to the court for an order of sale of his ward's real estate, including the remaining undivided one-half of that mentioned in the second answer, wherein, amongst other things, he stated that said ward was then the owner of certain described real estate, including said undivided half aforesaid, which real estate descended to said ward from his deceased mother, who died on said twenty-third day of March, 1865, and the other half thereof vested thereby in said petitioner as her widower, and, on an order of sale made thereon by the court, he sold said undivided half of said real estate belonging to said ward to said Tate, at private sale, for nine hundred and fifteen dollars, that ²³ being more than the appraised value, and the highest and best price he could obtain for said ward's said real estate; and upon report and confirmation of said sale, and the court's order to that effect, he conveyed said ward's said realty, so sold, to the said Tate, in fee simple, by guardian's deed, and under said deed put said purchaser into possession of said real estate as the owner thereof, and thereupon the said Tate took and, by himself and his grantees, has ever since held, and the plaintiff now holds, the full, open, notorious, and exclusive adverse possession thereof, under claim of ownership; that the said Thomas Tate and his grantees, including the plaintiff, have held open, exclusive, adverse possession of said premises described in said answer and in the plaintiff's complaint, under claim of ownership, for more than twenty years; that the defendant—appellant herein—became twenty-one years of age on the nineteenth day of June, 1882, more than eight years prior to the commencement of this suit, so she says the defendant ought not to have and maintain his second answer.

The third reply to the second answer alleges that the plaintiff now holds, and, with her grantors, mediate and immediate, has had and held full, exclusive, and open adverse possession of all of the real estate described in said answer and in her complaint, for more than twenty years, under claim of ownership thereof, and that the defendant did not, within two years following the time when he attained the age

of twenty-one years, assert any claim to any part of said real estate, in any manner whatever.

The fourth reply to the second answer alleges that the supposed claim of the defendant to one-sixth part of plaintiff's real estate described in her complaint and said answer accrued more than twenty years before the commencement of this suit, and the defendant became twenty-one ²⁴ years of age more than two years before the commencement of this action.

Briefly stated, the second reply sets up title by prescription in the appellee, and the third and fourth plead the statute of limitations of twenty years. The questions presented by these paragraphs are by no means free from difficulty, nor are we aided in their solution by the decisions of the courts of other states, amongst which there is an irreconcilable conflict. The more we examine them the more incongruous they seem. It is the general rule that the possession of one tenant in common is the possession of all, and for the common benefit of all, and when this condition of things obtains, the statute of limitations does not ordinarily run against any of them. In this state the rule is so far modified, we think, that if one enter under color of title, claiming the whole to himself, his possession will be adverse to his cotenant.

In *English v. Powell*, 119 Ind. 93-95, it is said: "That one tenant in common can oust his cotenant and acquire title as against him by prescription we have no doubt. Twenty years' occupancy, under color and claim of title to the whole estate, by one tenant in common, will give to the tenant so occupying title to the whole, as completely as if there had been no cotenancy. Such an occupancy constitutes an ouster, and its continuance for twenty years gives title."

We also cite *Freeman on Cotenancy and Partition*, section 223: "When one tenant in common is in possession of the whole estate, claiming under a deed purporting to convey the entire estate, he will be deemed to have ousted his cotenants": *Nelson v. Davis*, 35 Ind. 474; *Wright v. Kleyla*, 104 Ind. 223.

It is insisted by counsel for the appellant that to effect an ouster by a cotenant there must be an actual, ²⁵ continuous, notorious, distinct, and visible possession; such that a knowledge of its existence must be brought home to the cotenant, and this seems to be the law: 1 Am. & Eng. Ency. of Law, 233, and notes; *Manchester v. Doddridge*, 3 Ind. 360; *Bowen*

v. *Preston*, 48 Ind. 367 (377); *Nicholson v. Caress*, 76 Ind. 24; *Sanford v. Tucker*, 54 Ind. 219; *Jenkins v. Dalton*, 27 Ind. 78.

It occurs to us that the second paragraph of the reply, assailed by the appellant, conforms strictly to this rule by showing that the appellee, and those under whom she claims, have been in the full, open, notorious, and exclusive adverse possession of the premises in dispute, under claim of ownership thereof, ever since December, 1865. Such facts, if proved by satisfactory evidence, would constitute an ouster.

It is averred, in this reply, among other things, that the entry and possession were under deeds purporting to convey the entire title, and that the purchaser from Lemuel King, as widower, and said King as guardian of the appellant, paid the then full value of the premises so purchased.

In *Freeman on Cotenancy and Partition*, section 224, the author says: "The character of the entry may be inferred from the conveyance under which it is made, as well as established by the direct declarations of the party making it. The entry of a person under a conveyance which purports to convey a moiety may well be presumed to be simply as claimant of such moiety. But when the conveyance purports to dispose of the whole, . . . should not the entry be, of itself, sufficient evidence that the grantee intended thereby to assert all the rights with which his grantor has assumed the authority to invest him? In other words, is not an entry under a conveyance which purports to convey the entirety equivalent to an express declaration on the part of the grantee that he enters ²⁶ claiming the whole to himself; and is it not, therefore, such a disseisin as sets the statute of limitations in motion in favor of such grantee"?

In *Prescott v. Nevers*, 4 Mason, 326-330, cited by the author, Justice Story, said: "I take the principle of law to be clear, that, where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no adverse possession of any part of the land so described in any other person."

So, in *Jackson v. Smith*, 13 Johns. 411, where a conveyance had been made for a whole lot, but it appeared that the grantor, instead of being entitled to the whole property as sole heir, as was supposed at the making of the deed, was only one of the heirs, the court held that this did not change

the entry nor control the possession of the grantee, so as to render it an entry and possession as a tenant in common.

In *Culler v. Motzer*, 13 Serg. & R. 358, 15 Am. Dec. 604, the broad proposition is maintained that the possession of land by a purchaser under a deed of an entire lot is adverse to the rightful owner, though tenant in common with the grantor, because the entry is under an adverse title and not as a cotenant. The sale, in such case, of the whole tract, is in effect such assertion of claim to the whole as cannot be mistaken, because it is wholly incompatible with an admission that the other tenant in common has any right whatever. Acts of ownership on the part of such grantee must necessarily be adverse to any other part owner.

"His possession, taken under such deed and continuing the requisite period of time, creates in him a complete title in severalty, by virtue of the statute of limitations": *Thomas v. Pickering*, 13 Me. 337; *Marcy v. Marcy*, 6 Met. 360, 371; *Wright v. Saddler*, 20 N. Y. 320 (329).

Although Lemuel King and the appellant became tenants in common from and after the death of Lydia J. King, from whom both derived title, it does not necessarily follow, upon principle or upon authority, that this relation continued and involved Thomas Tate and subsequent grantees. A deed from one of several cotenants to a person in exclusive adverse possession, conveying absolutely all the property, does not make the grantee a cotenant with the other holders of the legal title, and so render his possession not adverse: *Frick v. Sinon*, 75 Cal. 337; 7 Am. St. Rep. 177; *Irey v. Markey*, 132 Ind. 546.

In the last case the court said: "Assuming that the deed was void, possession having been taken under it, it was sufficient to give color of title as against the grantors, and to set in motion the statute of limitations."

A vendee in fee derives his title from the vendor, but his title, though derivative, is adverse to that of the vendor. He enters and holds possession for himself, and not for the vendor: *Blight v. Rochester*, 7 Wheat. 535 (547, 548); *Society etc. v. Town of Pawlett etc.*, 4 Pet. 480.

A *bona fide* purchaser holds adversely to all the world. He may disclaim the title under which he entered and set up any other title and any other defense alike against his grantor and against others: *Croxall v. Sherred*, 5 Wall. 268; *Watkins v. Holman*, 16 Pet. *25; *Jackson v. Huntington*, 5

Pet. 402; *Willison* ²⁸ v. *Watkins*, 3 Pet. 43; *Voorhies* v. *White*, 2 A. K. Marsh. 26; *Winlock* v. *Hardy*, 4 Litt. 272.

It has been held that, "where one has knowledge of facts sufficient to put him upon inquiry, he is chargeable with knowledge of all matters which he could have learned with reasonable inquiry": *Kuhns* v. *Gates*, 92 Ind. 70.

In *Larman* v. *Huey*, 13 B. Mon. 436, the court held that, where one of two joint tenants sells and conveys a tract of land and gives possession, the grantee's title and possession is adverse to that of the other joint tenant, and, if the grantee hold a sufficient length of time by a continued open renunciation of the title of his cotenant, he may acquire title.

Buswell on Limitation of Actions, section 24, page 87. states it to be a general rule of the civil law that prescription begins to run from the time when the creditor acquires a full and perfect right to prosecute his demand. The period of limitation is to be computed from the time at which the creditor may legally prosecute his action: *Jacobs* v. *Graham*, 1 Blackf. 392; *Wright* v. *Tichenor*, 104 Ind. 185.

The statute of limitations begins to run, as to persons under legal disabilities, when the action accrues, but, if it has fully run before the disability expires, an action may be brought within the time limited after the disability is removed: *Barnett* v. *Harshbarger*, 105 Ind. 410; *Davidson* v. *Bates*, 111 Ind. 391; *Lehman* v. *Scott*, 113 Ind. 76; *Royse* v. *Turnbaugh*, 117 Ind. 539; *Wright* v. *Kleyla*, 104 Ind. 223; *Bauman* v. *Grubbs*, 26 Ind. 419 (421); *Herff* v. *Griggs*, 121 Ind. 471 (476); *Sims* v. *Gay*, 109 Ind. 501; *Walker* v. *Hill*, 111 Ind. 223.

The phrase "under legal disabilities" includes infants: Rev. Stats. 1881, sec. 296; *Bauman* v. *Grubbs*, 26 Ind. 419.

²⁹ The statute begins to run against infants precisely as against adults, when the right of action has accrued and is complete: *Davidson* v. *Bates*, 111 Ind. 391.

The only effect of appellant's disability of infancy was to give him, if the full limitation had run during his disability, two years under section 296 of the Revised Statutes of 1881, after he had attained the age of twenty-one years, within which he might sue: *Herff* v. *Griggs*, 121 Ind. 471, and numerous cases there cited.

Under the Revised Statutes of 1881, section 255, appellant, although an infant, could have sued as soon as Tate was put in possession under his first deed. Appellant was five years,

one month, and sixteen days old when Tate took possession under the guardian's deed.

This suit was commenced August 25, 1890, exactly twenty-four years and nineteen days after appellant's right of action accrued against the grantee. Appellant became twenty-one years of age June 19, 1882, exactly eight years, two months, and six days before this suit was commenced, and eight years, three months, and one day before he filed his answer and cross-complaint in this action, and this was the first claim made by him for his one-sixth interest in the real estate in controversy. He has slept upon his rights, and, under the statute of limitations, which is one of repose, he cannot now recover.

In view of the authorities cited the infant was not entitled to notice in order to set the statute in motion. The undisturbed possession, as shown by the reply, raises the presumption of notice, and constitutes a complete bar when the period has elapsed. What we have said in considering the demurrer to the second paragraph of the reply, applies equally well to all the paragraphs of the replies and answers demurred to, so far as the questions of the statutes of limitations, ouster, notice, and infancy ³⁰ are involved, and we think the court below did not err in any of its rulings of which complaint is made.

Judgment affirmed.

ADVERSE POSSESSION BETWEEN COTENANTS.—Although, as a general rule, an entry of one cotenant will inure to the benefit of all, yet he may so enter and hold as to render his entry and possession adverse: *Greenhill v. Biggs*, 85 Ky. 155; 7 Am. St. Rep. 579, and note; *Oglesby v. Hollister*, 76 Cal. 136; 9 Am. St. Rep. 177. To constitute an adverse possession between tenants in common there must be an actual ouster, and an exclusion of the other cotenants by the one in possession: *Mansfield v. McGinness*, 86 Me. 118; 41 Am. St. Rep. 532, and note. An ouster of cotenants may be inferred from undisturbed possession of another cotenant for a great length of time, accompanied by notorious acts of exclusive ownership: *Alexander v. Kennedy*, 19 Tex. 488; 70 Am. Dec. 358, and note. See, also, the notes to *Cook v. Clinton*, 8 Am. St. Rep. 821, and *Gillaspie v. Osburn*, 13 Am. Dec. 140.

COTENANCY—CONVEYANCE OF WHOLE TRACT BY ONE COTENANT.—Where a tenant in common conveys the whole land to a third person, and the grantee records the deed and enters under it, makes valuable improvements, pays the taxes, and receives the rents and profits without offering to account, the cotenant is chargeable with actual notice, and the possession is effectual against him: *Unger v. Mooney*, 63 Cal. 586; 49 Am. Rep. 100. A deed by a cotenant to a third person of the entire estate does not constitute an actual ouster of his cotenants: *Page v. Branch*, 97 N. C. 97; 2

Am. St. Rep. 281, and note; *Holly v. Hawley*, 39 Vt. 525; 94 Am. Dec. 350, and note. Where one tenant in common conveys to a stranger any but an undivided interest in the whole of the land, and such interest is prejudicial to the rights of the other cotenants, such conveyance is void as to them: *Benedict v. Torrent*, 83 Mich. 181; 21 Am. St. Rep. 589, and note. See further on this subject the notes to the following cases: *Barnes v. Lynch*, 21 Am. St. Rep. 473; *Rutter v. Small*, 6 Am. St. Rep. 437; and *Smith v. Huntoon*, 23 Am. St. Rep. 651.

ADVERSE POSSESSION—PRESUMPTION OF NOTICE.—To constitute adverse possession the true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice: *Normant v. Eureka Co.*, 98 Ala. 181; 39 Am. St. Rep. 45, and note. Possession must be adverse to and inconsistent with the rights of the owner before any grant can be presumed therefrom: *Arnold v. Stevens*, 24 Pick. 106; 35 Am. Dec. 305, and note; *Armstrong v. Bisteau*, 5 Md. 256; 59 Am. Dec. 115, and note.

SMITH v. CLAUSMEIER.

[136 INDIANA, 105.]

HABEAS CORPUS—IRREGULARITIES—REVIEW OF JUDGMENT.—After the court has acquired jurisdiction of the subject matter and of the person the subsequent proceedings, however erroneous, constitute no ground for the discharge of such person on a writ of *habeas corpus*. This writ cannot be used to review a judgment.

HABEAS CORPUS—JURISDICTION OF INFERIOR COURT—EVIDENCE TO IMPEACH.—In a *habeas corpus* proceeding for release from custody under a commitment made by a justice of the peace evidence is admissible to show that the record of the court is untrue, and that the justice never obtained jurisdiction of the person of the petitioner.

JUDGMENTS OF INFERIOR COURTS—JURISDICTION—COLLATERAL ATTACK.—The judgment of an inferior tribunal upon a matter over which it has jurisdiction cannot be assailed collaterally for errors or irregularities subsequent to acquiring jurisdiction. The jurisdiction, to be complete so as to preclude collateral attack, must exist both as to subject matter and as to the parties, and the recital of jurisdictional facts in the record may be shown to be false by evidence *aliunde*.

JURISDICTION OF INFERIOR COURTS IN CRIMINAL CASES.—To give a justice of the peace jurisdiction over the person of one charged with a violation of criminal law the first step necessary is the filing of an affidavit naming the offense and the person charged with its commission, and without such affidavit there is no jurisdiction, and all the proceedings are void. An affidavit filed afterward comes too late, and cannot be made to relate back so as to confer jurisdiction at the time of the trial.

JURISDICTION OF INFERIOR COURTS—CONCLUSIVENESS OF RECORD—EVIDENCE TO IMPEACH.—The record of a court of inferior or limited jurisdiction is given the same verity as that accorded the record of a court of general jurisdiction, only after it is shown that the inferior court had jurisdiction of the subject matters and the parties tried before it.

If jurisdiction is denied, no step can be taken until jurisdiction is shown. If the recitals in the record show jurisdiction and their correctness is admitted, that is sufficient; otherwise proof outside the record must be adduced to establish jurisdiction.

S. M. Hench, for the appellant.

H. Colerick and J. E. K. France, for the appellee.

¹⁰⁶ HOWARD, C. J. The appellant filed his petition for a writ of *habeas corpus*, alleging that he was unlawfully restrained of his liberty in the jail of Allen county by the appellee, who is the sheriff of said county.

On the issue of the writ the sheriff's return showed that the appellant was held on a *mittimus* issued by Daniel Ryan, a justice of the peace of Wayne township, said county, issued upon a judgment of conviction for vagrancy. It was further averred in the return that the appellant had been tried on a plea of not guilty, on an affidavit filed by one Henry Meyers, and that the judgment was unappealed from. Copies of the affidavit, the proceedings and judgment, and the *mittimus* were made parts of the return, each purporting to be of the date of June 15, 1893.

The appellant filed his exceptions to the return, alleging insufficiency and incorrectness.

Evidence was heard on the issues joined, and the court found for the appellee, that the appellant, petitioner, was lawfully in his custody as sheriff, and remanded the petitioner.

Numerous errors are assigned and discussed by appellant. The only question, however, that need be considered is whether the justice of the peace had jurisdiction to render the judgment and issue the *mittimus* set out in the record.

As to the irregularities claimed by counsel to exist in the proceedings subsequent to the alleged filing of the affidavit it may be said, in brief, that they constitute no ¹⁰⁷ ground for the discharge of the petitioner on the writ of *habeas corpus*. This writ cannot be used for the purpose of reviewing a judgment. If the court had jurisdiction of the subject matter and of the person of the petitioner the after proceedings, however erroneous, cannot be inquired into by any collateral proceeding; but relief must be sought by direct review: *Willis v. Bayles*, 105 Ind. 363; *McLaughlin v. Etchison*, 127 Ind. 474; 22 Am. St. Rep. 658; *Hurd's Habeas Corpus*, 2d ed., 251, and following.

In Church on Habeas Corpus, section 127, it is said: "Where a court of first instance has competent jurisdiction to try and punish an offense the higher court will not assume that the sentence is invalid, or unwarranted by law so long as it remains unreversed. Neither will the court require the authority of the court of first instance to pass sentence to be set out in the return to a writ of *habeas corpus*. It is bound to assume, *prima facie*, that the unreversed sentence of a court of competent jurisdiction is correct."

The offense charged in the case before us was vagrancy, for which the fine is "not more than fifty dollars nor less than five dollars." On failure to pay or replevy the judgment the defendant was committed to jail. The justice had, therefore, jurisdiction of the subject matter: Rev. Stats. 1881, secs. 1637, 1647, 2134; Gillette on Criminal Law, sec. 78; *Jenkins v. State*, 78 Ind. 133.

The question left for decision, then, is whether the justice had acquired jurisdiction of the person of the petitioner at the time of the trial and judgment.

The transcript of the proceedings before the justice was introduced in evidence. From this record it appeared that an affidavit in due form, charging the petitioner with the offense of vagrancy, was filed before the justice by one Henry Meyers, and that on this affidavit a warrant was issued by the justice and a trial had, resulting ¹⁰⁸ in the conviction of appellant of the offense charged; and that, on failure of appellant to pay or replevy the fine and costs adjudged against him, a *mittimus* was issued committing him to the jail of the county.

The appellant then offered to prove by appellee, the sheriff, and by said justice of the peace, and also by Henry Meyers, that the record was untrue in several particulars, and particularly that no affidavit or complaint was filed with the justice against the appellant, petitioner, at the time of the trial. The court, however, excluded all offered testimony in contradiction of the record.

Amongst the questions asked of Daniel Ryan, the justice, was the following, which, with the objection of the appellee, the ruling of the court, and the offer of the appellant, we set out as they appear in the bill of exceptions:

"Q. I will ask you if it is not the fact that the affidavit referred to and set out in your docket just read to the court, charging the petitioner with vagrancy, was not filed until

after you had tried the petitioner and had committed him to the jail of Allen county?

"The defendant, Edward F. Clausmeier, objected to this question on the ground that the evidence is incompetent, immaterial, and irrelevant, and tends to attack collaterally and by secondary proof the verity of the judgment. The objection was sustained by the court.

"The petitioner, by counsel, then offered to prove by the witness that the affidavit set out in the record of the justice of the peace, at page 64 of docket D, was not filed until after the prisoner had been tried and committed to the county jail.

"The evidence offered was excluded by the court, to which the petitioner excepted."

There is some apparent conflict in the decisions as to ¹⁰⁹ the credit which should be given to the record of a court of inferior and limited jurisdiction.

It has been held that in a proceeding before a justice of the peace to obtain surety of the peace the record of the justice as to the acts and things done by and before him is not conclusive, and may be contradicted by parol evidence: *Smelzer v. Lockhart*, 97 Ind. 315.

The statute (Rev. Stats. 1881, sec. 1106) provides that "every person restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of the restraint, and shall be delivered therefrom when illegal."

And it is the rule that any statute which may operate in restraint of personal liberty must be strictly construed: *Willis v. Bayles*, 105 Ind. 363.

Even in case of a court of superior and general jurisdiction, and where the record shows a judgment and sentence entered up against a defendant, a writ of *habeas corpus* will be awarded and the defendant discharged, on a plea to the return, with proof, showing that no such judgment was entered upon the order-book until after adjournment of court: *Passwater v. Edwards*, 44 Ind. 343.

Further, as to setting aside fraudulent and other judgments, in a court of general jurisdiction, see *Earle v. Earle*, 91 Ind. 27; *Miller v. Snyder*, 6 Ind. 1; *Patterson v. Pressley*, 70 Ind. 94; *Thompson v. McCorkle*, 136 Ind. 484; *post*, p. 334; Gillette on Criminal Law, sec. 67.

Brickley v. Heilbruner, 7 Ind. 488, was a case where a judgment had been taken before a justice of the peace of one

township, against a defendant who was a resident of another township, although the summons, on its face, and the record of the proceedings before the justice, showed that he was properly served. The common pleas court dismissed an action brought to vacate the judgment; ¹¹⁰ but, on appeal, this court held that as the defendant was not a resident of the township where the suit was brought, and as there was in his township a justice competent to act, the summons was a nullity; and, as the defendant did not personally appear before the magistrate and submit to jurisdiction, that the judgment itself was invalid.

So, also, in *Grass v. Hess*, 37 Ind. 193, it was decided that where a resident of this state is sued out of his county before a justice of the peace, and process by summons is served upon him, and judgment is rendered against him without appearance, an injunction will lie to stay proceedings under the judgment.

In a like case, *Gage v. Clark*, 22 Ind. 163, the court intimated a doubt as to whether the statutory modes of vacating judgments prevail before justices, as in courts of general jurisdiction.

In *Johnson v. Ramsay*, 91 Ind. 189, this court, in citing the cases of *Brickley v. Heilbruner*, 7 Ind. 488, and *Grass v. Hess*, 37 Ind. 193, say: "These cases show that in Indiana an application to the proper court to vacate the judgment of a justice, rendered against a person not a resident of the township in which the suit was brought, is a direct attack upon the judgment; and they also show that, upon such a direct attack, you may prove the want of jurisdiction over the person and the nullity of the summons, notwithstanding a recital in the record that the defendant was duly served with process."

The foregoing cases are cited and approved in *Brown v. Goble*, 97 Ind. 86.

In *Lavin v. Emigrant Industrial Sav. Bank*, 1 Fed. Rep. 641, it is said that, "There is no question of the general rule of law that where an act is justified or a title made under the official act or decree of an officer or court of special and limited jurisdiction, the burden ¹¹¹ is on the party setting up such title, or justifying such act to prove that the officer or court had jurisdiction. There must be evidence of those facts, the existence of which are essential to the exercise of the power or jurisdiction."

The court in that case holds, however, that a duly authenticated record, made by such officer or court of special or limited jurisdiction is *prima facie* evidence of the action taken upon the matter in question, and that "the presumption is always that the proceedings and acts of a court or public officer, apparently done in the discharge of his or its official duty, are regular and lawful, until the contrary is shown. . . . So far as the record shows, on its face, that he acted, his action, in the absence of evidence to the contrary, is presumed to be lawful rather than unlawful."

In *People v. Warden of County Jail, etc.*, 100 N. Y. 20, which was on an action for a writ of *habeas corpus*, the court, speaking by Ruger, C. J., said that the questions arising in the case were governed by the rule favoring the widest latitude of examination, inasmuch as the judgment assailed was rendered by a court of limited jurisdiction, and its authority in the premises was disputed; that judgments pronounced by courts of special and limited jurisdiction, when questioned in any collateral proceeding, are of no force or effect as establishing a right to enforce them, unless accompanied by proof of the jurisdictional facts upon which the authority of the court to render the judgments depends; that the recital of jurisdictional facts in the records of such courts does not furnish even *prima facie* evidence of their existence; that such proof, when furnished, is subject to the right of the person affected thereby to controvert it and to show want of jurisdiction; "that when, however, a court has jurisdiction of the subject matter, and has ¹¹² acquired jurisdiction of the person by the service of proper process, or the voluntary appearance of the party, it is competent for it to try and determine all questions within the issue arising during the course of the trial, and its decisions thereon can be reviewed only in a direct proceeding."

The case of *Vizzard v. Taylor*, 97 Ind. 90, was a suit to enjoin a county treasurer from collecting an assessment made in a proceeding before a board of county commissioners. It was said by this court in that case: "We do not controvert the doctrine, well settled by many cases in this court, that the decision of an inferior tribunal, upon a matter in which it has jurisdiction, cannot be assailed collaterally for errors or irregularities. But the jurisdiction, to be complete, so as to preclude collateral attack, must exist both as to the subject

matter and as to the parties": See, also, *Hord v. Elliott*, 38 Ind. 220.

In the *Board of Commrs. etc. v. Markle*, 46 Ind. 96, we think the correct rule as to collateral attacks on proceedings before courts of inferior jurisdiction was well stated. "The facts," said the court, "which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as, in the absence of which the court cannot rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false, and some courts hold that they are not even *prima facie* evidence of the truth, but that they must be proved by evidence *aliunde*. But whenever it is admitted, either in the pleadings or otherwise, as shown by proof, that such facts did exist, that the proper steps had been taken, such as the filing of an affidavit, petition, or other papers, authorizing the court to act, to make an investigation¹¹³ and decision, then the jurisdictional facts exist. The whole question begins and ends here."

In citing the foregoing case, in *Wilkinson v. Moore*, 79 Ind. 397, Woods, J., said that it may now be regarded as well settled that, while the judgment of a justice of the peace, or other inferior tribunal, in a matter of which by law such court had jurisdiction, and wherein it had, according to law, acquired jurisdiction of the person, cannot be assailed collaterally on account of mere irregularities in the proceedings subsequent to acquiring such jurisdiction; yet, that "it is equally well determined that presumptions will not be indulged in favor of courts of limited powers, and their judgments have no force unless it be affirmatively shown that jurisdiction was acquired."

In relation to the statutory provision (Rev. Stats. 1881, sec. 1119), prohibiting any court or judge from inquiring into the legality of any judgment or process whereby the party is in custody, or from discharging him when the term of commitment has not expired, in certain named cases, one being when he is held "upon any process issued on any final judgment of a court of competent jurisdiction," it has been well said by Mr. Church, in his work on Habeas Corpus, second edition, section 81: "We apprehend that the true construction of such a statute leaves the question of jurisdiction always open. To bar the applicant from a discharge, by

means of *habeas corpus*, the court in which the judgment was rendered, or from which the process was issued, must have had jurisdiction to render such judgment. The tribunal must be competent to render the judgment under some circumstances. The prohibition forbidding the inquiry, by a court or judge, into the legality of any previous judgment or process, does not, and cannot ¹¹⁴ without nullifying, to some extent, the general principles governing the issuance of the writ of *habeas corpus*, take from the court or judge the power, or relieve him from the duty of determining whether the judgment or process emanated from a court of competent jurisdiction; and whether the court rendering the judgment or issuing the process had the legal and constitutional power to render such judgment or send forth such process. It simply prohibits the review of a decision of 'a court of competent jurisdiction.' Where it appears that the relator is detained under the process, or under the final judgment of a court of competent jurisdiction, it is the duty of the court to remand him, unless it is shown that the process issued, or that the judgment was rendered without jurisdiction; and this the relator may always show, notwithstanding the statutory prohibition."

To give a justice of the peace jurisdiction over the person of any one charged with a violation of the criminal law the first step necessary is the filing of an affidavit naming the offense and the person charged with its commission. An affidavit filed afterward comes too late, and cannot be made to relate back so as to confer jurisdiction at the time of the trial: *Hoover v. State*, 110 Ind. 349 (353).

On the filing of the affidavit a warrant issues, and, on the apprehension and production in court of the defendant, the jurisdiction of the justice over the person is complete. As to all that may thereafter be done on issues based on the affidavit, whether what is done be regular and proper, or whether irregular and erroneous, it is not void, and can be inquired into only by way of appeal to a higher court. Without the affidavit, however, there is no jurisdiction, and all the proceedings are void.

¹¹⁵ In the case of a court of general jurisdiction such absolute verity is given to its record that we can examine that only to determine whether the court had jurisdiction or not. But in the case of a court of inferior and limited jurisdiction, as that of a justice of the peace, we may seek information

from any source to determine the question of jurisdiction; and, even if the record recites facts showing jurisdiction, the court may nevertheless hear other evidence in contradiction or support of the record, showing whether the justice had in fact acquired jurisdiction.

The reason for this distinction is patent. A court of general jurisdiction is presided over by a judge learned in the law, is attended by numerous attorneys and officers, and is held in a public place and at stated times. Liberal provision is made by the law for new trial, for review of judgment, and ample time given for appeal from erroneous decisions. There is slight danger, therefore, that any one may go without remedy for any wrong possibly done him before the court; and there is good reason for the rule that gives to the record of a court of such dignity the character of absolute verity.

To the record of a court of inferior and limited jurisdiction, as that of a justice of the peace or board of county commissioners, the same verity is given only after it is shown that such court had jurisdiction of the subject matter, and of the person of the defendant tried before it. If jurisdiction is denied, then no step can be taken until jurisdiction is proved. In case the recitals in the record show jurisdiction, and the correctness of such recitals is admitted, that is sufficient; otherwise, proof outside the record must be adduced to establish the jurisdiction.

In *habeas corpus* proceedings, where the freedom of the citizen is in question, no shadow of doubt must be left¹¹⁶ as to the legality of the proceedings under which he is held in custody. This writ, so long the bulwark of personal liberty, will be most sacredly guarded by the courts.

And while the record of a court of competent jurisdiction will always be respected, yet, before such record is received, the court or the judge before whom it is brought will first be assured that the court from which the record comes is in truth a court of competent jurisdiction. If the court is of general jurisdiction the record is received without further question, both as to jurisdiction and as to all subsequent proceedings in the case. If, however, the court is of inferior or limited jurisdiction, and its jurisdiction over the subject matter of the controversy, or over the person of the defendant, is controverted, then such jurisdiction must be first proved; otherwise, the whole record will be rejected.

In the case before us the correctness of the record of the justice of the peace was denied, and the appellant petitioner offered competent evidence to show that the affidavit set out in the record and purporting to be that on which a warrant issued for the defendant, and upon which he was tried, was in fact not filed with the justice until after the trial and imprisonment of the appellant. The court refused to admit the offered evidence. This was error.

The judgment is reversed, with instructions to receive the evidence offered to show that the justice of the peace had acquired no jurisdiction over the person of the appellant, and for further proceedings.

HABEAS CORPUS AS A WRIT OF REVIEW.—The writ of *habeas corpus* cannot have the force and effect of a writ of error or *certiorari* or appeal, nor is it designed as a substitute for either: *State v. Kinmore*, 54 Minn. 135; 40 Am. St. Rep. 305, and note. Mere errors or irregularities in court proceedings cannot be reviewed on *habeas corpus* for the discharge of a prisoner committed under process issued on final judgment of a court of competent jurisdiction: *In re Black*, 52 Kan. 64; 39 Am. St. Rep. 331, and note. See, also, the case of *In re Copenhagen*, 118 Mo. 377; 40 Am. St. Rep. 382, and note.

JUSTICES OF THE PEACE—IMPEACHMENT OF JURISDICTION.—Justices' judgments are only *prima facie* evidence of jurisdiction, in opposition to which it may be shown by any satisfactory means of proof that the authority of the court did not extend over the matter in controversy, nor over the parties to the action: *Townslly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181; 41 Am. St. Rep. 97, and note. Facts necessary to show that a court of limited jurisdiction has acted within its jurisdiction may be proved by other competent evidence in the absence of a statute requiring such facts to appear in the minutes or other records of its proceedings: *In re Williams*, 102 Cal. 70; 41 Am. St. Rep. 163, and note.

JUSTICES OF THE PEACE—JUDGMENTS OF.—COLLATERAL ATTACK ON: See *Leonard v. Sparks*, 117 Mo. 103; 38 Am. St. Rep. 646, and note.

SHULTZ v. SHULTZ.

[136 INDIANA, 323.]

JUDGMENTS—RIGHT TO RECOVER DAMAGES FOR OBTAINING.—So long as a judgment obtained by fraud stands, a party thereto cannot maintain an action to recover damages for so obtaining it, as a recovery in such action would operate as an impeachment of the first judgment.

JUDGMENTS—CONCLUSIVENESS.—A judgment, so long as it stands, imports absolute verity as to every proposition of law and fact essential to its existence against all parties to it.

JUDGMENTS—ACTION TO IMPEACH.—A party to a judgment obtained by fraud can avail himself of that fraud only in a direct proceeding to vacate and set aside the judgment, and not in an action to recover damages on the ground that such judgment was fraudulently obtained.

W. T. Brannaman, W. C. Lamb, W. P. Adkinson, and W. P. Hargrave, for the appellant.

W. K. Marshall and O. H. Montgomery, for the appellees.

324 McCABE, J. The circuit court sustained a demurrer to the complaint, and the appellant declining to amend or plead further, appellee had judgment upon the demurrer.

The only question presented by the assignment of errors is the correctness of that ruling.

The substance of the complaint is as follows:

Maria Shultz complains of Charles Shultz, Henry Struckman, and Margaret Roeger, and says that on the — day of March, 1859, she was married to the above defendant, Charles Shultz, and plaintiff and said defendant lived together as husband and wife until eight years before the filing of this complaint, the marital relations having continued the same until the sixth day of September, 1890, when they were divorced on plaintiff's application in the Marion superior court; that she bore children by said defendant, eight in number, only one of whom is living, namely, William. She helped her husband, during that time, to acquire two pieces of town property, real estate, described, in the city of Seymour, in said county, of the aggregate value of \$6,500, the title to which was in her husband's name; that, prior to her grievances thereafter specified, she joined her husband in a mortgage on the same to secure a debt of her husband, on one of the lots, for \$450 to one Conrad Akeret; that afterward Christian Struckman, her father, purchased said mortgage, and had the same assigned to him for the use and benefit of this plaintiff; that afterward, on the — day 325 of August, 1879, said Christian Struckman duly and legally executed his last will and testament, willing money and property to the value of \$1,600, and delivered the same to appellant for safekeeping, in which he provided as follows: He bequeathed to his son Frederick, \$100; to his son Henry, \$50; Louisa, daughter, \$50; to his daughter Minnie Stumke, \$5, and the residue of said \$1,600, in undivided parts, to this plaintiff and her son William; it further provided that \$450, the amount included in said mortgage on lot 8, as aforesaid, should be the property of the plaintiff, and taken out of her share as legatee under the terms of said will and by her held and controlled as a lien against said property; that said testator died on the twenty-second day of June,

1880, without revoking said will; that said property was at that time free from encumbrance, except the mortgage already mentioned, which was the only mortgage on said property she ever signed; that she was at that time the owner in fee simple of one-third of all said property; that, in the absence or neglect of her said husband, she was entitled to an additional \$600, exemption from execution, out of the same, and as the wife of said Charles Shultz she had other marital rights, in all amounting to the full value of all the property aforesaid; that defendants had full and complete knowledge at the time of all the foregoing facts, yet defendants did then and there cruelly and wickedly form a conspiracy among themselves to defraud plaintiff out of all her property rights, to injure her person and feelings, to humiliate her, and to carry out said conspiracy, etc., for gain for themselves. Soon after the death of testator the defendant Henry Struckman wrongfully procured possession of said will, mortgage, and one promissory note for \$250, executed by the defendant Charles Shultz and belonging to the estate of the testator under the terms of said will, the ³²⁶ plaintiff having inadvertently placed said will in a wrong package of papers, said will and mortgage then and there being the property of the plaintiff, and she further avers that Henry, after gaining possession of said will, did, knowing its contents, secrete, hide, or destroy said will, and to the date of the filing of this complaint secreted the same from the plaintiff up to the time of the complaint, and did fraudulently and wrongfully, with intent and purpose of defrauding the plaintiff, falsely and wrongfully claim to be the owner of said property, and fraudulently, and with the knowledge and co-operation of his codefendants, falsely cause suit to be brought in his own name, as the owner of said property to foreclose said mortgage, and to obtain judgment on said note, in the Jackson circuit court, to foreclose said mortgage and obtain judgment on said note against the appellant and Charles Shultz, Minnie Stumke, Fred Struckman, and Louisa Summan, brothers and sisters of said Henry, except Charles Shultz; that at the May term of said court for 1881 said Henry obtained judgment against Charles Shultz and this plaintiff for \$854.15 and foreclosure of said mortgage.

In furtherance of said conspiracy to injure and defraud appellant said Henry, with knowledge of all the defendants, wrongfully and for the purpose of defrauding appellant, pro-

cured execution to issue on said judgment, and on June 18, 1881, said lot, mortgaged as aforesaid, was sold by the sheriff for \$600, which was credited on the judgment against said Charles and appellant, and said sum fully satisfied any and all judgments against appellant at the time of said sale, leaving a balance on said judgment against said Charles Shultz, due and unpaid, in the sum of \$254.15; that appellant was an ignorant, unlettered woman, unsuspecting and confiding, and trusted and confided in the honor, integrity, and ³²⁷ justice of her said husband and brother, and they caused her to so do, and they promised in all matters herein mentioned to act fairly and justly by her; that at the commencement of the suit aforesaid, the defendant Charles Shultz, her then husband, falsely and fraudulently represented to this plaintiff, for the purpose of deceiving her and furthering said conspiracy to defraud her, with the knowledge of the other defendants, that he had employed counsel to defend said suit against him, and to defend all appellant's rights in and to all her real estate and personal property, both legal and equitable, in connection with the suit aforesaid.

Relying upon said representations she abided the same in good faith; whereas, in truth and in fact, the said Charles employed counsel for the purpose of carrying out said conspiracy, he withheld all information from said counsel so employed by him, for the fraudulent purpose of injuring this plaintiff, and, for said purpose, wholly refused to protect any of plaintiff's rights in said suit, or cause them to be protected, wholly refusing to attend said trial and make default therein; and for the purpose of more fully carrying out said conspiracy to defraud and ruin her in property rights and health, with knowledge of the other defendants, represented to appellant, for the better protection of her rights, it would be prudent, wise, and just for her to join him, the said defendant, in a conveyance of lot number 184 to A. J. D. Thurston, who would then and there convey the entire title to said property to this plaintiff; that he and counsel for the defense represented to her, with knowledge as aforesaid, that it would be an equitable and just settlement of the property rights between appellant and her then husband, and when so conveyed should be and remain hers in fee simple, and should be a settlement of her rights, legal and equitable, in and to the property ³²⁸ aforesaid, then in her husband's name, and

believing said representations to be true and safe, and the act and purpose right and just, and to protect her interest, she did, on the eleventh day of November, 1879, join her husband in a deed conveying said lot to said Thurston for the purpose aforesaid; that Thurston, in pursuance of said representations, on the same day, conveyed said property to appellant.

She further avers that the conveyances were made as aforesaid before judgment was taken against her and the said Charles, on said notes and mortgage, in the suit aforesaid; that there being a balance due on said judgment as aforesaid, the defendants Struckman and Charles Shultz did fraudulently and wrongfully, to carry out said conspiracy, institute proceedings in the Jackson circuit court against this plaintiff and the defendant Charles Shultz, to set aside the aforesaid conveyance, charging it to have been made to defraud the creditors of said Charles Shultz, the said Henry knowing at the time the allegations in that respect to be false; that for the purpose of carrying out said conspiracy during the pendency of said action said Charles Shultz represented to her that able counsel had been employed to defend her rights, that she need not employ counsel, and that her rights would be fully protected; that Hon. Jason B. Brown appeared without being employed by her, and while so engaged was ignorant of the conspiracy aforesaid, whereas, in truth and in fact, all the representations aforesaid, except the employment of counsel, were wickedly false and untrue, and made to permanently injure this plaintiff; that with the knowledge and approbation of his codefendant, Charles Shultz, he withheld from said counsel all the facts in said suit, such facts giving appellant the title in fee simple in and to the above-described real estate; that each one of the defendants knew ³²⁹ that the appellant was the *bona fide* owner of the same, and that said property was worth at that time \$2,500, and that she was the owner in fee of one-third of lot 8 aforesaid, said mortgage having been given to secure the debt of her husband, and in addition thereto she was the owner of the \$450 mortgage aforesaid, the gift of her father aforesaid. They knew she was entitled to \$600 under the exemption law of the state, she being a householder, yet, notwithstanding all these facts, had said cause set for trial on August 29th, appellant having none of her rights set up or defended, the facts as aforesaid being withheld from counsel without the

knowledge of the plaintiff, and in furtherance of said conspiracy procured judgment setting aside said conveyance to her and subjecting said property to sale for the payment of said small judgment, to wit, \$254.15, then wrongfully held by Henry Struckman against the defendant, Charles Shultz; that she was ignorant of the conspiracy, and was fraudulently informed by defendant Shultz that her property rights were duly protected, and that she had not lost any of her property in said suit, which she believed until the ejectment suit hereinafter mentioned; that execution was issued on the judgment against said Charles, which was levied on said property without plaintiff's knowledge; that on the seventh day of June, 1884, said property was sold at sheriff's sale on said execution to appellee Margaret Roeger for \$486.65, and that, after getting her deed, she brought an ejectment suit, and recovered judgment of ejectment against appellant, on which a writ of possession was issued, and thereupon she was dispossessed, etc., by which she is damaged \$9,000, for which she prays judgment.

There was no error in sustaining the demurrer to this complaint. The point to it all is that the conveyance to her by her husband through a third person ²³⁰ was, in a suit for that purpose, set aside as a fraud against her husband's creditors, and subjected and sold to pay his debts. Until that judgment is out of the way the appellant cannot recover another judgment which operates as an impeachment of the first judgment. If the judgment by which appellant's deed was set aside was fraudulently obtained, and the complaint had stated facts sufficient to establish that charge, yet, so long as the judgment stands, there could be no recovery of damages for so obtaining it, because, so long as it stands, it imports absolute verity as to every proposition of law and fact essential to its existence against all the parties to it: 1 Freeman on Judgments, sec. 289.

It imports that it was just, equitable, lawful, and right to set aside appellant's deed and subject the property to sale to pay the debts of her husband, with absolute verity. That being true, for the purposes of this case it makes no difference how wicked the conspiracy was that is charged against all the parties to bring about that result, as the result was just, right, and lawful, the conspiracy and evil acts charged did not harm appellant, did not deprive her of any legal right, and, therefore, no ground to complain is shown.

Before the complaint would be sufficient, it should show such a state of facts as that she could not get rid of the judgment by some proceeding for that purpose known to the law.

If the complaint had stated facts sufficient to show that the judgment was obtained by fraud it still would have been insufficient, because she was a party to that judgment and she can only avail herself of that fraud in a direct proceeding to vacate and set aside the judgment: *Earle v. Earle*, 91 Ind. 27; *Nealis v. Dicks*, 72 Ind. 374; *Hogg v. Link*, 90 Ind. 346.

³³¹ The same is true of the other judgment mentioned, by which the mortgage was foreclosed.

The allegation that her father's will was her property, and that her brother Henry secreted it, does not make a cause of action, because it is not alleged that it was of any value to her or anybody else, and, moreover, if it may be supposed to have some value, it is not stated that the secretion of the will worked any harm or damage to her. If, notwithstanding its wrongful secretion, appellant received all that it bequeathed to her, then its secretion by appellee Struckman could not be the basis of a judgment for damages.

As to the note with which she charges her brother of wrongfully taking out of her possession the complaint shows that it belonged to the estate of her father. In any possible view we think the complaint wholly failed to state a cause of action.

The judgment is affirmed.

JUDGMENTS—CONCLUSIVENESS OF.—A judgment of a court having jurisdiction is binding on the parties, no matter how erroneous it may be, until reversed or annulled: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and extended note; *Peck v. McLean*, 36 Minn. 228; 1 Am. St. Rep. 665; *Gould v. Sternburg*, 128 Ill. 510; 15 Am. St. Rep. 138, and extended note. A judgment, though clearly erroneous, is conclusive as an estoppel: *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186. See, also, the cases collected in the note to *Burner v. Hevener*, 26 Am. St. Rep. 955.

JUDGMENTS—IMPEACHING FOR FRAUD.—A domestic judgment of a court having jurisdiction of the subject matter and of the parties cannot be questioned collaterally for fraud *aliunde* the record by the parties or privies: *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95, and note; *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156, and note. A judgment or decree obtained by fraud is not void in the sense that it can be assailed in a strictly collateral proceeding: *Smithson v. Smithson*, 37 Neb. 535; 40 Am. St. Rep. 504, and note.

NEW PITTSBURGH COAL AND COKE COMPANY v.
PETERSON.

[186 INDIANA, 393.]

MASTER AND SERVANT—FELLOW-SERVANTS—VICE-PRINCIPAL.—Employees serving a common master, engaged in the same common pursuit, and in accomplishing the same common object, are fellow-servants. The mere fact that one of them has power to employ or discharge the others does not make him a vice-principal.

MASTER AND SERVANT—VICE-PRINCIPAL.—A foreman may be, and ordinarily is, but a mere fellow-servant. The burden is upon an injured servant to show by allegations in his complaint that such foreman, whose negligence caused the injury, is a vice-principal and not a fellow-servant.

MASTER AND SERVANT—VICE-PRINCIPALS.—The question as to whether an employee is a vice-principal or a fellow-servant must be determined by ascertaining whether the act performed or duty omitted is one, the doing of which is charged upon the master, and by him delegated to the servant. If it is the servant is a vice-principal, and the master is liable for injury resulting from such act or omission by such servant, provided the injured servant is free from negligence and has not assumed the hazard.

MASTER AND SERVANT—VICE-PRINCIPALS.—Whether an employee is a vice-principal or a fellow-servant does not depend upon his rank, but upon the fact as to whether the duty omitted or the act performed by him is one owing from the master to the injured servant, the discharge of which the master has conferred upon the negligent servant.

MASTER AND SERVANT—DUTY OF SERVANT—LIABILITY OF MASTER.—Fellow-servants owe to their master a diligent and watchful care over his business, and to each other a vigilance and caution for their own safety. The master is not liable for the consequences of their unfaithfulness to him unless he continues them in his employ with knowledge thereof, nor is he liable when he has violated no duty owing by him to them.

MASTER AND SERVANT—VICE-PRINCIPALS—LIABILITY OF MASTER.—A servant injured by the negligence of another servant must show by his complaint that some duty of the master to him has been violated in order to hold the latter liable, and, if such duty is one, the discharge of which has been delegated by the master to a servant, not only the duty but the delegation of it, as well as its violation, must be alleged and shown by the complaint.

J. S. Bays, for the appellant.

W. C. Hultz and G. G. Riley, for the appellee.

399 HACKNEY, J. The appellee sued the appellant in the court below for personal injuries, and recovered judgment for five thousand dollars.

His complaint was in four paragraphs, the first of which was, in substance, as follows:

The appellee was employed to do general work in and

about the appellant's coke-yards, and to haul away ashes and other refuse, haul slack, and clean the yards, from July 30, 1888, to and including February 19, 1889; that he was inexperienced in working with machinery, as the defendant well knew; that on said last-named day one Gus Lawrence was defendant's agent to employ and discharge its workmen, including the plaintiff, and to control their works; that said Lawrence negligently directed the plaintiff to clean certain of defendant's slack-elevators, and the place of performing such work was dangerous, in that it became necessary to stand close to the machinery of the elevator, and upon the buckets thereof, and that, if the machinery was put in motion while he was so occupied, injury was sure to follow, of which dangers said defendant well knew; that plaintiff entered upon the work so assigned, in the presence and under the direction of said Lawrence, and "reposed confidence in the prudence and caution of the defendant, and that defendant would notify him of the starting of the machinery, so that he could remove" from its dangers; that while so engaged, and without notice or warning, the defendant negligently put the machinery in motion, whereby plaintiff, without fault or negligence on his part, was drawn into the guide of the elevator belt and buckets, and sustained the injuries complained of.

400 The second paragraph varies from the first only in alleging that the plaintiff's employment was special, in that it was to haul slack, clean the yard, and haul ashes and other refuse, and that he was inexperienced and unacquainted with the use of said machinery, and ignorant of the dangerous character of the work.

The third paragraph is, in effect, the same as the second, excepting that it alleges that the plaintiff was directed to perform said service near the time for starting the machinery in motion, and that the defendant knew, or by ordinary care could have known, of the nearness of the time for starting said machinery, and that it would start while plaintiff was so engaged, and of his dangerous situation.

The fourth paragraph differs from the first only in alleging, in addition to the facts contained in the first, "that the place furnished the plaintiff to work in was not a safe place, but was extremely dangerous in this, that death or great bodily harm was sure to result to one who occupied the place so assigned the plaintiff, when the machinery was in motion," and "that plaintiff did not know of the proximity of the time

for starting said machinery." This paragraph, however, does not allege negligence in the starting of the machinery, or that it was started by the defendants or its servants.

In considering the sufficiency of this complaint it is essential that we keep in view the theory upon which it proceeds; in other words, the duty of the master for the violation of which a recovery is claimed. The master is not charged with supplying improper, imperfect, or unusual machinery for the purposes in which it engaged the servants operating the mill, nor is it alleged that there was any negligence in employing or retaining in the service ignorant, unskilled, or habitually negligent servants, nor is it an element of the cause of action that ⁴⁰¹ the master failed to adopt proper rules for the government of its servants, nor that the machinery was started in violation of such rules as to the time or manner thereof.

The necessary conclusion is that the injury complained of was the result of negligence in not delaying the starting of the machinery while Peterson was in the elevator. We are not to presume that the engineer knew of Peterson's situation when he started the machinery, nor can we presume that he started the machinery at an unusual time. More briefly stated, it is not for us to presume that the engineer acted willfully or negligently.

The only negligence charged is that of Lawrence. If he was a fellow-servant of Peterson, and not a vice-principal, all of the paragraphs of complaint were bad. The allegation of Lawrence's relation to the master, as we find it in every paragraph, was that one Gus Lawrence was defendant's agent, with full authority "to control the work of and to employ and discharge the plaintiff from his employment, as well as other servants of said defendant."

Whether Lawrence was a vice-principal in performing the service in which his negligence caused the appellee's injury must be determined from this allegation, in the light of the authorities. But for this allegation it clearly appears that the appellee and Lawrence were serving the same common master, and were engaged in the same common pursuit, in accomplishing the same common object, and were, therefore, fellow-servants.

The questions of rank and of power to employ and discharge servants are not controlling in the consideration of

the relation of Lawrence to the appellant: *Justice v. Pennsylvania Co.*, 130 Ind. 321.

As there said, in effect, the controlling consideration ⁴⁰² is whether the act or omission is one arising from a duty owing by the master to the servant, the discharge of which duty is intrusted by the master to the negligent servant.

In *Brazil etc. Coal Co. v. Cain*, 98 Ind. 282, the complaint alleged that Hopkins was the master's "bank boss, and, as such, had charge of its coal mine and control of the men working therein, and it was his duty to look after, care for, and superintend said mine, and the entire workings therein, and to secure and keep the rooms, entrances, and openings of such mine in a safe condition." This was held insufficient to charge the master with the negligence of Hopkins as a vice-principal.

This case has been followed with approval in numerous cases, including *Indiana Car Co. v. Parker*, 100 Ind. 181; *Pittsburgh etc. Ry. Co. v. Adams*, 105 Ind. 151; *Lake Shore etc. Ry. Co. v. Stupak*, 108 Ind. 1; *Indiana etc. Ry. Co. v. Dailey*, 110 Ind. 75; *Cincinnati etc. R. R. Co. v. McMullen*, 117 Ind. 439, 10 Am. St. Rep. 67.

The most that can be claimed for the allegations of the complaint before us, upon the question under immediate consideration, is that Lawrence was the master's foreman as to the labors of Peterson and others of the master's employees.

That a foreman may be, and that he is, ordinarily but a fellow-servant is very fully discussed in *Indiana Car Co. v. Parker*, 100 Ind. 181, where many of the cases on the subject are reviewed. In that case the distinction is clearly made between cases where the service of the foreman or other employee of superior rank involves the performance of some duty owing by the master to his servants, as in the supplying of proper machinery or safe places to work, and those cases where the duty violated is one, not of the master, but of one servant to another ⁴⁰³ engaged in one common employment. There some of the cases cited by the appellee in this case are reviewed, and their application to a case not involving a duty of the master is denied. So it may be said of all other cases cited by the appellee in this case. They involve authority from the master to the foreman to supply proper machinery and safe working places, duties clearly owing by the master, and which could not be so delegated as to absolve him from liability.

In cleaning the elevator the appellee and Lawrence were discharging a duty owing from both to the master, and they were necessarily fellow-servants. The negligence of Lawrence in failing to prevent the starting of the machinery is not shown to have been the omission of a duty expressly or impliedly delegated to him by the master.

In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one, the doing of which is charged upon the master and delegated to the servant. In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted. If he has, and his act or omission while in that particular service involves a duty owing by the master to the servant, the master is liable for injury resulting from such act or omission, if the injured servant is free from negligence, and has not assumed the hazard.

In *Spencer v. Ohio etc. Ry. Co.*, 130 Ind. 181, Spencer was directed, by one under whose orders he was required to work, to clean a locomotive, and, while engaged in the task, under the boiler, the engineer started the locomotive and ran upon him. It was there said: "If there was negligence on the part of the employees of the company, either in ordering him to clean the engine, or of the engineer in starting the engine, it was the negligence ⁴⁰⁴ of a co-employee, for which the appellee is not responsible": *Wilson v. Madison etc. R. R. Co.*, 18 Ind. 226; *Gormley v. Ohio etc. Ry. Co.*, 72 Ind. 31; *Ewald v. Chicago etc. Ry. Co.*, 70 Wis. 420; 5 Am. St. Rep. 178; *Pease v. Chicago etc. Ry. Co.*, 61 Wis. 163; *Bergstrom v. Staples*, 82 Mich. 654.

In *Pease v. Chicago etc. Ry. Co.*, 61 Wis. 163, is quoted, with approval, from *Heine v. Chicago etc. Ry. Co.*, 58 Wis. 528, as follows: "The fact that the negligent employee has the power to direct and order the acts and movements of the one injured does not take the case out of such [fellow-servant] rule."

The case of *Bergstrom v. Staples*, 82 Mich. 654, makes the distinction between cases where injury is the result of imperfect or insufficient machinery, rendering the place of service dangerous, and cases where the service is hazardous because of those dangers which are necessarily incident to use of proper machinery, and the case may be regarded upon the construction we have given the complaint before us.

The case of *Ell v. Northern Pac. R. R. Co.*, 1 N. Dak. 336,

26 Am. St. Rep. 621, is a very instructive case, and holds the fellow-servant rule not to depend upon the rank of the negligent servant, but upon the fact as to whether the duty omitted is one owing from the master to the injured servant, and one the discharge of which the master has conferred upon the negligent servant. There the negligent servant was in control of the men and the work, with authority to direct and supervise, and power to employ and discharge. The negligence was in failing to block a long pile which was being removed from a car upon skids, the foreman having knowledge that, to omit such blocking, one end of the pile would slide faster than the other, and, in doing so, fall between the skids, where the injured servant was ⁴⁰⁵ working. The foreman was held to be a fellow-servant of the injured employee.

The fellow-servant rule is founded in wisdom, and any departure from it is dangerous to the prosperity and perpetuity of the enterprises of manufacturing, mining, railroad-ing, and those industries requiring the services of many servants. More than this, it increases the dangers to such servants who may be so employed. When the master has supplied a safe place to work, has employed skillful and diligent servants, and has furnished suitable and safe appliances with which to perform the service, it is a rare instance in which he is liable for injuries to his servants. The servants owe to the master a diligent and watchful care over his business, and they owe to each other a vigilance and caution for their own safety. The master should not be held for the consequences of their unfaithfulness to him unless he continues them with knowledge of their faithlessness. The master should not be liable for their neglect of the duty they owe to each other, for that is by no fault of his. The rule which deprives them of compensation for injuries sustained from the neglect each of the other inspires that care and diligence in the discharge of their duties, both to the master and to themselves, which is essential to the welfare of the master and the safety of each other. When the rule is destroyed its inducement to care is gone, and the master, if not liable for the fault of his servants as between themselves, has servants whose duties require no care excepting that each shall look to his own safety.

Where it does not appear that the master has violated a duty owing to his servant, there is not, and should not, be

any liability by the master. The burden must rest upon the injured servant to show, by his complaint, that some duty of the master has been violated. If that duty ⁴⁰⁶ is one the discharge of which has been delegated to another, not only the duty, but the delegation of it, as well as its violation, must be shown.

The complaint before us fails to plead facts taking the case out of the general rule. Nothing is alleged from which we can infer a breach of duty by the master, or by one standing, by authority, in the place of the master, in the performance of any duty owing by the master.

We conclude, therefore, that the allegations of the complaint are not sufficient to establish the relation of vice-principal by Lawrence, the alleged negligent servant.

The judgment of the circuit court is reversed.

MASTER AND SERVANT—VICE-PRINCIPAL—WHETHER FOREMAN IS.—A railway section foreman, having power to control, employ, and discharge the men under him, occupies the position of vice-principal as to them, in so far as they are affected by his acts: *Sweeney v. Gulf etc. Ry. Co.*, 84 Tex. 433; 31 Am. St. Rep. 71, and note; *Colorado etc. Ry. Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335, and note; *Sullivan v. Hannibal etc. R. R. Co.*, 107 Mo. 66; 28 Am. St. Rep. 388, and note; *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66; 41 Am. St. Rep. 85, and note. *Contra*, see *Spanake v. Philadelphia etc. R. R. Co.*, 148 Pa. St. 184; 33 Am. St. Rep. 821, and note.

MASTER AND SERVANT—TEST AS TO WHETHER SERVANT IS VICE-PRINCIPAL.—The liability of a master for the negligence of his servant, whereby another servant was injured, does not depend upon the doctrine of *respondet superior*, but upon the omission of some duty which the master owes to the injured servant that he should have performed: *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616, and note. A person employed by a master, and given power to superintend, control, and direct other employees engaged in the performance of certain work for the master, is, as to the men under him, a vice-principal, whatever he may be called: *Bloyd v. St. Louis etc. Ry. Co.*, 58 Ark. 66; 41 Am. St. Rep. 85.

MASTER AND SERVANT—VICE-PRINCIPAL—EFFECT OF RANK.—As to whether a servant is a vice-principal does not depend on the question of rank: *Hankins v. New York etc. R. R. Co.*, 142 N. Y. 416; 40 Am. St. Rep. 616, and note; *Jenkins v. Richmond etc. R. R. Co.*, 39 S. C. 507; 39 Am. St. Rep. 750, and note; *Daves v. Southern Pac. Co.*, 98 Cal. 19; 35 Am. St. Rep. 133, and note; *Colorado etc. Ry. Co. v. Naylor*, 17 Col. 501; 31 Am. St. Rep. 335.

MASTER AND SERVANT—MASTER, WHEN LIABLE FOR NEGLIGENCE OF FELLOW-SERVANT.—A servant may recover damages for the negligence of his fellow-servant if the latter was unskilled and incompetent to perform his duties, and this was known to the master, or could have been known to him by due care, and was not known to the injured servant: *Campbell v. Cook*, 86 Tex. 630; 40 Am. St. Rep. 878, and note, with the cases collected.

THOMPSON v. McCORKLE.

[186 INDIANA, 484.]

JUDGMENTS—SERVICE BY PUBLICATION.—Constructive service of process by publication addressed to “John McCorkle and — McCorkle, his wife,” he being then dead, is no notice as to her of the pendency of the action; and a judgment based on such constructive service of process alone is void as to her, and she is entitled to have it set aside.

COTENANCY—PURCHASE OF TAX TITLE.—A cotenant in possession cannot acquire title as against his cotenant by purchasing a tax title to the common property.

TENDER—WHEN UNNECESSARY.—In an action by one cotenant to set aside a tax title to the common property acquired by another cotenant, no tender of taxes is necessary before bringing suit.

TAX TITLES—SETOFF.—One who at tax sale acquires the title of the grantee of a husband whose wife has not released her inchoate dower interest in the land cannot, as against such wife’s interest, set up as a counter-claim taxes paid before the vesting of her dower interest by her husband’s death.

TAX TITLE—INCHOATE DOWER INTEREST.—A purchaser of a tax title to land in which a wife holds an inchoate dower interest becomes the legal owner, subject to such interest, and is bound to pay the taxes on the land until the wife’s dower interest becomes vested by the death of her husband.

STATUTE OF LIMITATIONS—DOWER.—The statute of limitations does not begin to run against the inchoate dower interest of the wife in lands until the death of her husband.

JUDGMENTS—SETTING ASIDE—WANT OF JURISDICTION.—A judgment cannot be set aside for want of jurisdiction of the person of the defendant when the findings upon which it is based show that it was rendered upon a valid record of service made in good faith.

JUDGMENTS—DIRECT ATTACK—WANT OF NOTICE.—An attack on a judgment by the judgment defendant, on the ground of want of actual notice, and fraud in its procurement, constitutes a direct attack.

ACTIONS—PARTIES—DOWER.—A widow claiming a dower interest in lands conveyed by her husband in his lifetime by deed in which she did not join, and subsequently sold for taxes, is a necessary party to an action to quiet title to the land.

TAX TITLES—EFFECT ON DOWER INTEREST.—A wife’s inchoate dower interest in land is not divested or affected by a tax sale of the land in the absence of a statute so providing.

TAX TITLES.—PURCHASER AT TAX SALE TAKES ONLY A DERIVATIVE TITLE when the law requires the land to be listed for taxation in the name of the owner.

TAX TITLES—RIGHTS OF PURCHASERS—EFFECT ON DOWER INTEREST.—A widow is entitled to recover her dower interest in lands conveyed by her husband by deed in which she did not join and subsequently sold for taxes, without repaying to the purchaser at the tax sale such taxes as were paid by him before her dower interest became vested by the death of her husband.

S. P. Thompson, B. K. and W. F. Elliott, for the appellant.

T. B. Adams and I. Carter, for the appellee.

⁴⁸⁵ DAILEY, J. The appellee, as widow of John McCorkle, who died at Shelbyville, Indiana, May 20, 1880, on the thirteenth day of January, 1890, brought an action, in the Jasper circuit court, against the appellant, alleging, in substance, that her husband, prior to August 23, 1859, owned the north half of the southeast quarter of section ⁴⁸⁶ 21, township 31 north, range 7 west, containing eighty acres, in said county; that plaintiff is the owner of the undivided one-third of said real estate, and defendant is owner of the undivided two-thirds part thereof; that the same is susceptible of equitable partition between the owners according to the respective rights and interests; that defendant, with the wrongful intent to cheat and defraud plaintiff, on December 3, 1883, filed in the Jasper circuit court a complaint in two paragraphs, in which he falsely alleged that he was the owner in fee of said tract and certain other lands therein described; that when the same was filed he knew he was the owner in fee of but two-thirds, and that plaintiff was the owner in fee of the one-third part thereof; that plaintiff was, at the time of filing said complaint, and ever since has continued to be, such owner; that said Thompson, in his complaint, falsely alleges that "the defendant claims some interest in said land, the nature of which is unknown to plaintiff, but plaintiff says that said claim casts a cloud upon his title to said real estate"; that in pursuance of his fraudulent design, and to carry the same into effect, he caused and procured an affidavit to be made by one Austin, averring that said action was brought to quiet title to certain land in said county; that defendants were necessary parties thereto, and were nonresidents of the state of Indiana; that on said false affidavit, and pursuant to his fraudulent design, and to carry the same into effect, he caused and procured the clerk of the Jasper circuit court to issue and publish in the *Rensselaer Republican*, a weekly newspaper of general circulation, printed and published in said county, a notice to certain parties, among whom were John McCorkle and — McCorkle, his wife, notifying them that plaintiff had filed his complaint in said court, to quiet his title to and foreclose a tax lien on, said premises, ⁴⁸⁷ and that the same would stand for trial on Saturday, January 26, 1884; that afterward he procured the publisher of said paper to make an affidavit of the proper publication of said notice, and caused the same to be filed in the office of the clerk of said court as proof of the pendency

of said cause and of the subject matter thereof, and procured the clerk to indorse the filing thereon; that no other notice was ever issued or given to the defendants, or either of them, in said cause; that no summons was ever issued in said cause, and no notice of the pendency of said suit was ever served upon or given to the plaintiff herein; that she did not, either by person or attorney, enter her appearance to said suit; that she did not waive the service of process upon her in said suit, and did not acknowledge process or the service of process upon her therein, and had no notice or knowledge that such suit had ever been brought or judgment taken in the same, until November 6, 1889, and there was no attempt to bring her into court in said suit, except by publication as stated; that afterward said Thompson, pursuant to his fraudulent design, and to carry out the same, presented to the court said notice and said affidavit of publication as proof of notice to defendants in said suit, and moved the court thereupon to default the defendants in said cause for want of appearance and answer, which motion was sustained, and said defendants were called in the names as set out in said notice, and, as such, defaulted; that thereupon said Thompson moved the court for judgment against defendants upon such default, which motion was sustained, and judgment was then rendered quieting the title to, and foreclosing his tax lien on, said real estate, and adjudging him to be the owner in fee thereof; that the court also found the notice sufficient to give the court jurisdiction ^{as} of both the subject matter and the parties defendant to said suit.

Plaintiff further avers that John McCorkle died intestate at Shelby county, Indiana, on May 20, 1880, and that she has resided continuously in said Shelby county for seventy years last past; that at no time during her life has she lived in any state, territory, district, or county other than where she now resides; that her name is Maria McCorkle.

And plaintiff further says that by reason of the fraudulent conduct of defendant he procured said fraudulent judgment to be rendered; that the court had no jurisdiction of her person to render any judgment against her in said suit to quiet title to said real estate; that said judgment is both fraudulent and void, but is a cloud upon her title to one-third of said real estate.

Wherefore she asks that said judgment be adjudged void as to her, and set aside, and held for naught; that she have

partition of said real estate; that she be adjudged the owner in fee of the one-third of the same; that commissioners be appointed to make partition, and that she have all other further and proper relief.

To this complaint there was an answer filed in five paragraphs. To the third and fifth a demurrer was sustained. The fourth paragraph of what purported to be the answer, was a counterclaim. To this paragraph plaintiff filed an answer in three paragraphs. A demurrer was sustained as to the second of these, and overruled as to the third. A reply to the second paragraph of the answer was filed in three paragraphs. To the first and third of these a demurrer was overruled.

The issues, as made, and upon which the cause was tried, were upon the complaint; the first, second, and ⁴³⁹ fourth paragraphs of answer; the reply to the second paragraph of the answer, in three paragraphs; and first and third paragraphs of answer to the counterclaim.

The court found the facts specially, and stated its conclusions of law thereon. The defendant excepted to each conclusion of law, and thereupon moved for judgment in his favor, which motion was overruled. The plaintiff moved for judgment in her favor, which motion was sustained. The appellant has assigned many errors, being numbered, in the record, from 1 to 13, inclusive. Some of these have not been discussed by him, and are, therefore, waived. We will endeavor to consider such questions as were assigned as error and have been discussed.

The complaint sets forth evidentiary facts, as well as facts which the statute requires shall be pleaded. This was evidently done that plaintiff's cause of action might be tested by demurrer.

"Ordinarily, an action for partition does not present the question of title for adjudication, but the pleadings may be so framed as to present that question." "Where a plaintiff undertakes to set forth the facts which constitute his title he will fail unless the facts are sufficient to clothe him with the title asserted, and it is the facts sufficiently pleaded which will control, and not the general averments": *Spencer v. McGonagle*, 107 Ind. 410 (413); *McPheeters v. Wright*, 110 Ind. 519; *City of Logansport v. McConnell*, 121 Ind. 416.

The complaint before us must be tested by applying the law to the facts specially pleaded, for it is the rule that if,

under the law, the defendant's appears to be the better title, or if the plaintiff's title appear not sufficient ⁴⁹⁰ to entitle her to recover on its own strength, then the complaint should be held bad. The demurrer was for want of facts.

The complaint shows that plaintiff resided in Shelby county, Indiana, for seventy years continuously, and that the only service, as to her, was by publication addressed to — McCorkle, wife of John McCorkle; that the husband had died May 20, 1880.

We recognize the rule that even on constructive service the question of the jurisdiction of a court of record over the parties to any domestic judgment must, in all collateral proceedings where fraud is not shown, be determined by the record where the jurisdiction affirmatively appears from the record. In such case it would import absolute credit and verity, and parties could not be heard to impeach it. In other words, it will be conclusively presumed that the court acted upon ample evidence and with due deliberation before making such statement; and the judgment will be impregnable to any collateral assault by proof *aliunde*.

In *Muncey v. Joest*, 74 Ind. 409, the court says: "There is a clear distinction between cases in which there is no notice whatever and those in which there is a mere defective or irregular notice.

"The general rule upon the subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void, and may be overthrown by a collateral attack. If a court having jurisdiction, . . . and required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively show that no notice was given; and this is so although the record show a defective and irregular notice."

⁴⁹¹ The later decisions of this court seem to establish the rule that an action of this character, where no fraud is alleged, is not a direct attack upon the judgment, and that "any attack upon a judgment for want of jurisdiction in the court to render it, predicated upon a matter *dehors* the record, is collateral": *Cully v. Shirk*, 131 Ind. 76; 31 Am. St. Rep. 414.

The complaint in this action assails the complaint on

which the judgment was rendered, which is sought to be set aside, the notice thereof by publication and the judgment rendered in said cause also, on the ground that Maria McCorkle is only attempted to be made a party by the following definition or description of herself, "John McCorkle, — McCorkle, his wife," and it appears that all this transpired more than two and one-half years after the death of the husband. Would such attempted description or identification of a person, " — McCorkle," his wife, following a name which applied to no person then in being, constitute notice to Maria McCorkle? The husband being dead when the suit was instituted, with the cessation of life he was placed beyond the jurisdiction of all earthly tribunals, and such proceeding thus far was a nullity. By the death of John McCorkle appellee could no longer sustain the relation of wife to him; his companion had become his widow, and, as against the widow, from the complaint, no suit was ever instituted or prosecuted, and no judgment ever obtained.

We think that such complaint and notice could not alone create jurisdiction over the person of Maria McCorkle so as to bind her by a decree, and that a record containing such indefinite and uncertain description would be void as to her.

This court, in *Schissel v. Dickson*, 129 Ind. 139, says: "A judgment is void if the court rendering it had no jurisdiction of the subject matter. It ^{is} is not, however, necessarily void because the court did not have rightful jurisdiction of the person against whom it is rendered. If there had been service of process, although irregular, but which the court adjudges regular and sufficient, the judgment rendered is not void, and although it may be set aside, in a direct proceeding, for that purpose, it will withstand a collateral attack."

One of the questions upon which the court was required to pass was the sufficiency of the affidavit, and whether or not, in fact, the service by publication on the parties named in the affidavit and notice was sufficient to give the court jurisdiction of their persons, so far as these questions thus decided may be brought in question collaterally, that decision, although erroneous, is conclusive on the parties. It is, however, only parties to judgments and those who are in privity with them who are thus bound.

And the court further finds that constructive service addressed to — Hilton, without other description or identi-

fication, will not suffice to bring into court Cora B. Hilton or Cora B. Dickson, and she is in no manner affected by the decree. This court, in *Clark v. Hillis*, 134 Ind. 421, held that notice to — Clark, by publication, is not binding upon Helen I. Clark, and she may attack the proceeding collaterally.

Where the complaint alleged that the defendant was not a resident of the county where he was returned, as served by a copy left at his last and usual place of residence; that he never made his home, or even stayed over night, at the house where the copy was left, and it is also alleged that he was not at the time within the jurisdiction of the court in which the action was pending, and it is averred that the pretended service and return to summons were procured by the fraud of the attorney of the plaintiff, such charge would be a direct attack on ⁴⁹³ the judgment. The features of nonresidence and fraud are the controlling elements that make it so: *Dobbins v. McNamara*, 113 Ind. 54; 3 Am. St. Rep. 626; *Penrose v. McKinzie*, 116 Ind. 35; *Cavanaugh v. Smith*, 84 Ind. 380.

In *Nietert v. Trentman*, 104 Ind. 390, the court held that in a proceeding under the statute (2 Rev. Stats. 1876, sec. 99, p. 82; Rev. Stats. 1881, sec. 396) to set aside a default and to be relieved from a judgment, the plaintiff may show, as an excuse for not appearing to the action in which he was defaulted, that summons was not in fact served upon him, and that he had no notice of the pendency of the action, or of the rendition of the judgment, notwithstanding the fact that the sheriff's return shows service by reading.

As the complaint in this case alleges residence in the state, no actual notice, and fraud in its procurement, it constitutes a direct attack. In other words, it shows that the court acquired no jurisdiction over the person of the appellee, as well as the existence of fraud. There was no motion to separate causes of action, nor was there any demurrer on account of actions improperly joined, and if the facts stated show that the judgment should be set aside as to the defendant therein, then the complaint was good against the demurrer for want of sufficient facts. If there were two causes of action joined in one paragraph of complaint misjoinder would not be cause for reversal: Rev. Stats. 1881, sec. 341.

Tersely stated, if the defendant is not made a party and is not served with process, then there is no jurisdiction, and

without jurisdiction there can be no valid judgment as to her. It would be a mere nullity, and a complaint stating these facts would resist a demurrer.

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself all proceedings ⁴⁹⁴ founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress. . . . If it be null no action upon the part of the plaintiff, no inaction upon the part of the defendant, . . . can invest it with any of the elements of power or of vitality": Freeman on Judgments, sec. 117.

It is considered unjust and unconscionable to allow a cloud to remain upon title where the proceeding has been without notice and opportunity of defense.

The conclusion we have reached from the averments of the complaint, that the appellee was not a party to the judgment she seeks to vacate and set aside, as a legal wrong renders it unnecessary for us to determine what the effect of section 600 of the Revised Statutes of 1881 would have been, had she been a party to the action which she seeks to avoid. No tender of taxes was necessary before the suit: *Schissel v. Dickson*, 129 Ind. 139. The complaint states facts sufficient to constitute a cause of action.

If the appellant and appellee were tenants in common at, before, and ever since the pretended judgment was taken, one tenant in possession cannot get title to the premises against his cotenant, by allowing the property to be sold for taxes: *Bender v. Stewart*, 75 Ind. 88.

With reference to the ruling of the court in overruling a demurrer to the third paragraph of answer to the appellant's counterclaim we only need state that appellee owned no part of the land sold for taxes, at the time it was sold, and was under no legal obligation to pay them. The most she then had was an inchoate right to the one-third ⁴⁹⁵ part, which would ripen into a title in the event she survived her husband.

When appellant bought the land at tax sale he got no more than the man had who purchased it from John McCorkle. There would be no pretense that if Thompson's title

depended upon a conveyance to him by McCorkle's grantee the appellee would not own the interest she asserts, or that she would be liable for taxes accrued prior to the death of her husband. By his death her *status* was changed, and she became legally bound to pay one-third of the taxes to accrue thereafter during the cotenancy.

The counterclaim asks that, if the judgment be set aside, appellee be required to pay him money for taxes assessed and paid by him before she was his tenant in common.

Appellant, when he bought the land at tax sale, was bound to know that appellee had not joined in the deed with her husband, and, in the event she survived him, she would inherit the interest now claimed. He took the risk just the same as if he had bought directly from John McCorkle. As he acquired no title against appellee, at tax sale, for what he paid, he became the legal owner of the land, subject to her inchoate interest, and, as such, was bound to keep the taxes paid: *Snoddy v. Leavitt*, 105 Ind. 357 (362); *Wright v. Tichenor*, 104 Ind. 185.

Concerning the action of the court in overruling a demurrer to the first paragraph of answer, it is the law that the statute of limitations never begins to run against a person until a cause of action in his favor accrues. There was no cause of action against appellee until the husband died, May 20, 1880: *Wright v. Tichenor*, 104 Ind. 185.

The same reasoning applies to the assignment of error 496 "that the court erred in overruling a demurrer to the third paragraph to reply of the second paragraph of answer."

We find no error in the rulings upon the pleadings.

The eighth assignment of error, "that the court erred in overruling the motion of appellant for judgment in his favor on the special findings of fact," raises a somewhat different question. These findings, as we construe them, show no breach of duty on the part of the appellant. There does not appear in them a single element of fraud practiced by appellant, either on the court or the appellee. The findings that in appellant's action to quiet his title to the land in controversy, against the plaintiff, appellee herein, the service was by publication based upon affidavit, setting up that she was a nonresident of the state of Indiana, which was not true in point of fact, she being, at the time, a resident of Shelbyville, in this state, but the place of her residence was unknown to defendant and to W. B. Austin, who made the

affiadvit; that on the 20th of March, 1884, upon proof of publication of notice to her, as a nonresident of the state, she was called and defaulted, and a decree entered foreclosing a tax lien in favor of said Thompson, and the land sold at sheriff's sale, of which proceedings she had no knowledge; that the decree of the Jasper circuit court foreclosing said lien against her is null and void, because the court had no jurisdiction to enter the same; that it is a cloud upon her title, and should be set aside as to her, show that appellee was a party to the judgment she seeks to vacate.

There is nothing in the finding that tends to show that appellee was not a party to the record. On the contrary, the finding shows she was a party to both the notice and record containing the decree of said court. Had the finding recited the form of what purported to ^{be} the notice given and the record thereof, as they really existed, "— McCorkle, wife of John McCorkle," it would have been apparent to the court, that there was no notice to appellee, and no record to which she was a party, and hence nothing which she was estopped to deny.

Having failed to find such facts, and having found that there was a complete record of service, as to appellee, made in good faith, the record concludes her from asserting the contrary.

Where the special facts found show that the assault was purely collateral it would violate well-established rules to allow it to prevail upon matters *dehors* the record.

The conclusions of law, from the facts found, are erroneous.

Being of the opinion that justice will be best subserved by instructions to the court to grant a new trial, rather than to restate conclusions of law, judgment is reversed, with instructions to the court to grant a new trial.

OPINION ON MOTION TO MODIFY MANDATE.

DAILEY, J. The learned counsel for the appellant have filed a motion to modify and change the decision and the mandate in this cause.

This motion is supported by two vigorous and able briefs, which present substantially the same questions. The case had due consideration, and the questions involved were fully considered in the original opinion, and we deem it unnecessary to repeat what is there said.

It is clear that a complaint by a judgment defendant, as-

depended upon a conveyance to him by McCorkle's grantee the appellee would not own the interest she asserts, or that she would be liable for taxes accrued prior to the death of her husband. By his death her *status* was changed, and she became legally bound to pay one-third of the taxes to accrue thereafter during the cotenancy.

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The conclusions of law, from the facts found, are erroneous.

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This motion is supported by two vigorous and able briefs, which present substantially the same questions. The case had due consideration, and the questions involved were fully considered in the original opinion, and we deem it unnecessary to repeat what is there said.

It is clear that a complaint by a judgment defendant, as-

sailing a decree on the ground of want of actual notice and fraud in its procurement, constitutes a direct attack ~~and~~ thereon, and it is unnecessary to further collate authorities in support of so plain a proposition.

Counsel say "the appellee was not a necessary party to the suit to quiet the title of the appellant to the land, because her right was not of record in Jasper county, so the question as to whether — McCorkle, wife of John McCorkle, was a sufficient description of the person of the appellee is not material."

This position is not tenable. Appellant attempted to make her a party, and evidently thought it was essential. We fully concur in the theory he then adopted, because it harmonizes with, and is supported by, section 2143 of Elliott's Supplement, which says: That "all parties who have, or claim to have, or appear of record in any of the public offices of the county where such land or lot is situated, to have any interest in or lien upon such lands or lots, shall be made defendants in such suit."

The appellee claimed, and still claims, an interest in the land, and is a necessary party defendant.

When one seeks, by constructive notice, to obtain a judgment against another, there must be a strict compliance with the statute, because a notice not provided for by statute does not constitute notice, and cannot divest title.

Section 2491 of the Revised Statutes of 1881 provides that "A surviving wife is entitled, except as in section 17 (section 2483) excepted, to one-third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death," etc.

"The rights of the widow, under this section, do not descend to her as heir; she takes by virtue of her marital ~~and~~ relations with her deceased husband": *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, 48 Ind. 367.

By virtue of this statute, during the lifetime of the husband, the wife had an inchoate right in the real estate in controversy contingent upon her surviving him, and which could not become absolute except by his death. Her claim, during the entire interval, was in such a position that it could not be asserted by any one. The case was not one of

mere disability growing out of coverture. Strictly speaking, she had no estate in the premises; it was a mere expectancy. Had she died before her husband the right would have been extinguished. It could not be transmitted by will or the laws of descent. It was one she could not transfer by sale, except to relinquish it to the owner of the fee. It could not have been sold on execution, and is not barred by a tax sale and conveyance in consequence thereof. She could have brought no action during the interim to arrest the running of the statute, had it once been set in motion against her, and she had no right or title which could have been enforced while the husband lived: *Miller v. Pence*, 132 Ill. 149; *McClanahan v. Williams*, 136 Ind. 30.

It is true the legislature may declare that a wife's inchoate interest shall be divested by a tax sale, and a conveyance of the land thereunder, but our lawmakers have not so provided, and until it has been so enacted by clear and express words, her contingent interest should not be destroyed by judicial decision. This interest is in lieu of and is analogous to dower, except it has been enlarged from a life estate to a fee, and is guarded with more jealous care by legislative enactment and judicial decision.

It is urged that appellant and appellee could not be tenants in common, unless the latter had been such tenant ⁵⁰⁰ with the state, since, it is claimed, the former gets his title from the state. This is incorrect. The state never owned this land, and could not buy land at a tax sale. The only thing the statute speaks of as belonging to the state, when the taxes on realty are not paid, is a lien therefor. It is assumed as a fundamental proposition that the lien of the state for taxes is paramount; then it is concluded that all interests, vested and inchoate, are subject to the sovereign right. It is true an inchoate right does not exist against the sovereign will, in the exercise of the right of eminent domain, because in such case the property itself is taken and paid for, while in the assessment and collection of taxes the property itself is not taken; no compensation is guaranteed or given—the tax is a lien on the property, and the property is not taken by the state to satisfy the lien—but it is sold for that purpose. The distinction between taxation and the taking of property in the exercise of the power of eminent domain is clear and well recognized in the authorities: 1 Blackwell on Tax Titles, 5th ed., secs. 11, 51.

This being so, principles governing as to the law of eminent domain are not applicable in considering the question of the law of taxation.

The case of *Duncan v. City of Terre Haute*, 85 Ind. 104, involving a dedication by a husband, is instanced, but is not in point, for the reason that it arises under a different statute, and on a different state of facts. No case is decisive of any thing except the question involved and decided in it, and whether it was well considered or not it cannot control the decision of this case.

It is said by counsel that a tax title is not a derivative title; that it does not come from the owner, but from the sovereign; that the purchaser does not derive title through the former owner; that there is no privity between ⁵⁰¹ them, and that taxes are not laid upon titles, but upon the land.

In answer to this we quote from Blackwell on Tax Titles, third edition, page 547: "In those states where the tax is a charge upon the land alone, where no resort, in any event, is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion, and remainder. In such case the tax law itself is notice to the whole world of the liability of the land for all public assessments. . . . On the other hand, where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and in case of default authorizes the seizure of the body or the goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only, when all other remedies have been exhausted, then the sale and conveyance by the officer passes only the interest of him in whose name it was listed, upon whom the demand was made—who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such cases the title is a derivative one, and the tax purchaser can recover, in ejectment, only such interest as he may prove to have been vested in the defaulter at the time of the assessment. Any other construction of laws containing such provisions would be in violation of the spirit which moved the legislature to enact them, and be the means of depriving innocent persons of their estates."

Our law requires the land to be listed in the name of the owner. Section 6378, a personal demand of the tax. Section 6427 authorizes the personalty to be first ⁵⁰² sold. Sections 6447, 6429, and the realty cannot be sold as long as there is personalty to pay the tax: *Abbott v. Edgerton*, 53 Ind. 196.

It is also made the duty of an executor or administrator to pay the taxes accrued against the personal and real estate of the decedent at the time of his death: Rev. Stats. 1881, sec. 2378.

These provisions are almost identical with those laid down by the author, and upon that authority it is plain that the purchaser at the tax sale did not get the appellee's inchoate interest, and that by such sale her interest was in no wise affected.

We think it is settled law that no part of the tax paid by the appellant on the land, before the appellee's inchoate rights vested, can be charged to her. The appellant had possession of the entire premises until then, and gets two-thirds of it in fee. As he held a deed for it, and all of it was listed in his name, and taxed to him, and none to the appellee, there was no duty resting upon her to pay the taxes on one-third of it, and to have done so would have laid her liable to an action on his part for slandering his title, had she insisted that she owned the one-third of the tract in fee. She was powerless, and could do nothing to protect herself.

Can it be said, notwithstanding all this, that the statute, will run and bar her rights? It would be unjust to give in such construction, and we are not inclined to do so.

In view of what we have said it cannot be insisted that she could prevent the misfortune by paying the taxes herself. She did not own the land, and was under no obligation whatever to do so. The law never contemplates that a person shall do an unreasonable act to protect her rights. Moreover, she could not know that she would survive her husband; and it would be very ⁵⁰³ unreasonable to require her to pay taxes which she never could recover back, and when there was no assurance that she would, in the end, have a vested interest in the land.

We feel that it would be unjust in this case, for the reasons stated, to modify and change the decision and mandate.

The motion is therefore overruled.

COTENANT.—A PURCHASE AT A TAX SALE of the common property by one cotenant in the name of a third person inures to the benefit of all the cotenants. All that the purchaser can demand of them is contribution to the expense by which the common property has been relieved from embarrassment: *Tanney v. Tanney*, 159 Pa. St. 277; 39 Am. St. Rep. 678, and note.

DOWER—LIMITATIONS OF ACTIONS.—Dower is not within the statute of limitations: *Barnard v. Edwards*, 4 N. H. 107; 17 Am. Dec. 403. The statute of limitations does not bar a widow's right to dower: *Sellman v. Bowen*, 8 Gill & J. 50; 29 Am. Dec. 524. A widow's right of action for dower in lands conveyed by the husband without her joining in the deed accrues at his death, and the statute of limitations commences to run against her from that date: *Winters v. De Turk*, 133 Pa. St. 359. See, also, the note to *Hitchcock v. Harrington*, 5 Am. Dec. 237.

DOWER—WHETHER EXTINGUISHED BY JUDICIAL SALE AGAINST HUSBAND OR CONVEYANCE BY HIM.—A sale of lands in partition proceedings is a judicial sale, and such a sale of a husband's interest in land to which he is a party extinguishes the wife's right of dower therein though she was not a party: *Williams v. Wescott*, 77 Iowa, 332; 14 Am. St. Rep. 287. At the common law a widow's right of dower in the lands of which her husband was seised during their coverture was superior to the claim of a creditor thereto obtained by sale under a judgment against the husband: *Combs v. Young*, 4 Yerg. 218; 26 Am. Dec. 225, and note. Dower provided by law in behalf of the widow is paramount to all conveyances, contracts, encumbrances, debts, or liabilities of the husband executed or incurred during coverture: *Higginbotham v. Cornwell*, 8 Gratt. 83; 56 Am. Dec. 130, and note. See, also, the notes to the following cases: *Den v. Frew*, 22 Am. Dec. 710; *Moore v. Mayor*, 59 Am. Dec. 475; *Reis v. Lawrence*, 49 Am. Rep. 87; *Leavitt v. Lamprey*, 23 Am. Dec. 687, and *Thompson v. Morris*, 9 Am. Dec. 863.

JUDGMENT—PROCESS BY WRONG NAME—EFFECT.—If process is served on the defendant personally, in which he is designated by an incorrect name, the judgment is valid, and cannot be collaterally attacked by proving that the person named in the process as defendant was not in fact the person served: *Foshier v. Narver*, 24 Or. 441; 41 Am. St. Rep. 874, and note.

JUDGMENTS—VACATING FOR WANT OF JURISDICTION.—An action may be maintained to set aside a judgment rendered by a court which had obtained no jurisdiction from want of service of process: *Magin v. Lamb*, 43 Minn. 80; 19 Am. St. Rep. 216, and note; *People v. Greene*, 74 Cal. 400; 5 Am. St. Rep. 448. A judgment obtained against a party without service of process can be relieved against by motion in the original cause: *Orocker v. Allen*, 34 S. O. 452; 27 Am. St. Rep. 831, and note. See further the notes to *Johnson v. Gregory*, 31 Am. St. Rep. 910; *Wilson v. Hawthorne*, 20 Am. St. Rep. 294, and *Taylor v. Lewis*, 19 Am. Dec. 137.

CASES
IN THE
SUPREME COURT
OF
IOWA.

STATE v. CHAMBERS.

[87 IOWA, 1.]

WITNESS—WIFE AGAINST HUSBAND.—A PROSECUTION AGAINST A HUSBAND FOR INCEST is a criminal proceeding for a crime committed against his wife, and she is therefore a competent witness against him under a statute declaring that neither a husband nor wife shall be a witness against the other except in a criminal prosecution for a crime committed by one against the other.

INCEST AND RAPE.—One accused of incest cannot escape conviction on the ground that the female upon whom the crime was committed did not consent thereto, or was of such an age that she was not at the time capable of giving her consent. That the act so committed also constitutes the crime of rape does not prevent it from constituting the crime of incest.

Charles W. Kepler, for the appellant.

John Y. Stone, attorney general, for the state.

² GIVEN, J. 1. The appellant was charged with the crime of incest before a justice of the peace, and on April 6, 1891, he waived examination, and gave bond to appear and answer before the grand jury. The district court being then in session, the grand jury returned an indictment on April 11, 1891, against the defendant, charging him with the same act of incest. The appellant moved to quash the indictment for the reason that no opportunity was given him to challenge the grand jury, and because the grand jury had no right to take jurisdiction of the case. It does not appear from the record whether the defendant was held to answer at the term of court then in session or at the next term; but as the magistrate was not required to make return to the ³ district

court until "on or before its opening, on the first day of the next term thereof," we must presume that he was held to appear at the next term. We must also presume that the magistrate did not make his return to the term then in session. From this record we conclude that the grand jury did not act upon a return from the magistrate, but took up the case as though there had been no preliminary hearing. The fact that the appellant had been held to appear at a future term did not divest the grand jury of jurisdiction to examine the case upon its own motion. Having this jurisdiction, and having so examined the case, and returned the indictment, the appellant had no right to challenge the grand jury.

2. Salina Chambers was called and sworn as a witness on behalf of the state, and having testified that she was the wife of the defendant, "the defendant now objects to the competency of this witness to testify in this case," which objection was overruled. The wife having testified to her marriage to the defendant, to improper conduct of his toward Sarah D. Cowden, and to what was said between the witness and the defendant at the time, the defendant moved to strike out all her testimony, "because she is the wife of the defendant, and is incompetent to testify against him." This motion was overruled. It will be noticed that the objection and motion were solely upon the ground of incompetency of the witness, and the contention is that this is a criminal prosecution for a crime committed against the wife. Section 3636 of our code provides as follows: "Every human being with sufficient capacity to understand the obligation of an oath is a competent witness in all cases, both civil and criminal, except as herein otherwise provided." The exception declared is found in section 3641, as follows: "Neither the husband nor wife shall, in any case, be a witness against the other, except in a criminal proceeding for a crime committed by one against the other, or in a civil action or proceeding, one against the other; but they may, in all civil and criminal cases, be witnesses for each other."

In *State v. Bennett*, 31 Iowa, 24, a prosecution against the wife for adultery, it was held that the husband was a competent witness against his wife: See, also, *State v. Hazen*, 39 Iowa, 648. In *State v. Sloan*, 55 Iowa, 217, it was held that on the trial of the husband for bigamy his legal wife was a competent witness in behalf of the state. The court says: "In our opinion, if the defendant is guilty of bigamy, he com-

mitted a crime against his wife. We think she was a competent witness": See, also, *State v. Hughes*, 58 Iowa, 165.

In *People v. Quanstrom*, 93 Mich. 254, the supreme court of Michigan holds, under the Michigan statute, that "bigamy on the part of the husband is not such a personal wrong or injury to the wife as to allow her to testify against the husband." Section 7546 of that statute is as follows: "A husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other." In *Bassett v. United States*, 137 U. S. 496, a prosecution for polygamy, it was held, under the Code of Criminal Procedure of Utah, that the offense charged was not such a wrong against the wife as to render her testimony admissible. The exception contained in that code is where the testimony is given with the consent of both, or "in cases of criminal violence upon one by the other." It will be noticed that the exceptions in these statutes apply to personal wrong or injury, while under ours they apply to "all criminal prosecution" for a crime committed one against the other." There are many crimes other than against the person which one may commit against another.

Compton v. State, 13 Tex. App. 271, 44 Am. Rep. 703, is a case identical with this. That was a charge of incest against the husband with the daughter of his wife, and the competency of the wife to testify was raised, under a statute the same as ours. The court held that she was not a competent witness against her husband, overruling *Morrill v. State*, 5 Tex. App. 447; *Roland v. State*, 9 Tex. App. 277; 35 Am. Rep. 743. It is the fact of the marital relation that makes the acts here charged constitute the aggravated crime of incest. Were it not for this relation, these acts would constitute a much less grave offense. The crime charged is surely as much, if not more, a crime against the wife of the accused, than would be the crime of adultery or bigamy. Following former decisions of this court, we hold that this is a prosecution for a crime committed by the defendant against his wife, within the meaning of section 3641, and that Mrs. Chambers was a competent witness for the state.

Counsel for the appellant, in argument, called attention to section 3642 of the code, providing that neither husband nor wife can be examined in any case as to any communication

made by the one to the other while married. The record fails to show that any objection was made on the trial, based upon this statute. As already stated, the objections were grounded solely upon the claim that the witness was incompetent. It does not appear from the record that the witness was called upon to testify to any communication made to her by her husband, within the meaning of the section referred to. The rule of this section, in its spirit and extent, is analogous to that which excludes confidential communications: 1 Greenleaf on Evidence, sec. 338. There was no error in permitting Mrs. Chambers to testify, ⁶ nor in refusing to strike the testimony which she had given.

8. The appellant asked the following instructions, which were refused, and of which refusal he complains:

"2. The crime of incest can only be committed by the mutual acts of the parties, and both parties are equally guilty, under the facts pleaded in the indictment; and hence, in this case, if you find from the evidence of the prosecutrix, Sarah D. Cowden, that she and the defendant had sexual intercourse, then, in law, she was an accessory and accomplice with the defendant to the crime charged in the indictment, and you cannot convict on her testimony alone, but she must be corroborated by other witnesses, tending to connect the defendant with the crime charged."

"4. In order to constitute the crime of incest the defendant and the prosecutrix, Sarah D. Cowden, must have mutually agreed to have, and did have, actual copulation; and, unless the evidence satisfies you of this fact beyond a reasonable doubt, you should acquit the defendant."

Code, section 4559, is as follows: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely show the commission of the offense, or the circumstances thereof." The appellant contends "that both parties must mutually agree to have sexual intercourse, and have actual copulation, before the crime of incest is committed"; that, if consent on the part of the female is wanting, it is not incest, and if she consents she is an accomplice, and must be corroborated, as provided in section 4559. In *State v. Sanders*, 30 Iowa, 582, the defendant was ⁷ charged with adultery, and the woman with whom it was charged he committed the crime testified that the act

was committed by the defendant forcibly, and against her will. The defendant asked an instruction to the effect that such evidence was not sufficient to sustain the indictment; that it would prove a rape, but is not enough to convict for adultery. This court says: "In order to constitute the crime of adultery the act must be willingly done. This condition is an essential ingredient in this as in all other crimes. But it is to be applied to the party who commits the offense, and not the one with whom or against whom it is done. The defendant's guilt does not depend upon the guilt or innocence of Elmyra Wyman. If, for certain reasons, she may not be guilty, it does not change the character of the act, so far as he is concerned. On his part, it was willingly done; and it is, therefore, within the definition the law gives of the offense. It may appear that the act was so far without the woman's consent as to amount to rape; yet, as to defendant, it was an unlawful carnal connection, and willingly done on his part, which, with the fact of marriage, constitutes the crime of adultery, and the defendant may be convicted therefor." The instruction was held to be properly refused. This was followed in *State v. Donovan*, 61 Iowa, 279: See, also, *Commonwealth v. Bakeman*, 131 Mass. 577; 41 Am. Rep. 248. Guilt may exist, and is none the less enormous, because the act was without the consent of the female. To hold otherwise is to say that the crime of incest cannot be committed with one who, from infancy or other cause, is incapable of consenting to the act. Sarah D. Cowden was but little over thirteen at the time this crime is charged to have been committed; and, although it does not appear that she resisted the approaches of her stepfather, it can hardly be said that she so consented as to become his accomplice in the commission ^s of the crime. *State v. Miller*, 65 Iowa, 60, is relied upon by the appellant. The question there determined was the sufficiency of the evidence. The question whether, in such cases, each party is an accomplice to the other, so that section 4559 applies, was not before the court. We think the instructions were properly refused.

We find no errors in the record, and the judgment of the district court is therefore affirmed.

WITNESSES—WIFE AGAINST HUSBAND.—A wife is competent to testify against her husband in a criminal action whenever she is the individual particularly and directly injured or affected by the crime for which he is

being prosecuted: *Dill v. People*, 19 Col. 469; 41 Am. St. Rep. 254, and note; *Commonwealth v. Sapp*, 90 Ky. 580; 29 Am. St. Rep. 405, and extended note; *State v. Boyd*, 2 Hill, 288; 27 Am. Dec. 376, and extended note. See, also, the extended note to *Roland v. State*, 35 Am. Rep. 744.

INCEST—NECESSITY AGAINST CONSENT OF FEMALE.—The crime of attempt to commit incest may be committed, though the female upon whom the attempt was made did not consent, but on the contrary resisted with force: *People v. Gleason*, 99 Cal. 359; 37 Am. St. Rep. 56, and note. See, also, the extended note to *Commonwealth v. Bakeman*, 41 Am. Rep. 249.

INCEST—RAPE.—Evidence showing the commission of rape will not sustain a conviction under an indictment charging incest alone: *State v. Jarvis*, 20 Or. 437; 23 Am. St. Rep. 141.

MINGUS v. DAUGHERTY.

[87 IOWA, 56.]

PRINCIPAL AND SURETY.—A SURETY IS ENTITLED TO THE BENEFIT OF ALL SECURITIES in the hands of the creditor, and if such securities, or any part thereof, are lost by his fault, without the consent of the surety, he is relieved from liability to that extent.

PRINCIPAL AND SURETY.—A SURETY IS RELEASED FROM LIABILITY IF A CREDITOR WAIVES ANY LIEN or by his delay loses his right to enforce it, if such lien would have resulted in the discharge of the debt had it been properly pursued.

PRINCIPAL AND SURETY.—A SURETY ON A LEASE IS RELEASED BY THE NEGLIGENT FAILURE of the landlord to enforce his lien as such landlord to the extent of the securities thus lost.

PRINCIPAL AND SURETY.—A LANDLORD HAVING A LIEN as such does not release a surety on the lease by failing to enforce his lien, unless such failure arose from his want of reasonable diligence. If he had no reason to anticipate loss by delay he was not bound to proceed, nor was he bound to proceed if the property subject to the lien did not justify an attempt to enforce it. Whether the landlord was so negligent, and, if so, what loss, if any, resulted therefrom, are questions for the jury, and an instruction which assumes that the failure to enforce the lien released the surety is therefore erroneous.

ACTION upon a lease by which the defendants agreed to pay as rent sixty thousand brick, and, on failure to do so at a time designated, to pay one hundred and twenty dollars. Defendants Mills and Ross claim to be sureties of the defendant Daugherty, and that he for a long time had on the premises the sixty thousand brick ready for delivery, and that plaintiff was informed of this fact and requested to receive the brick, and that he, without the consent of the sureties extended the time for payment; that plaintiff had, by the laws of the state, a lien as landlord on the bricks of

which he refused to avail himself. A judgment was entered in favor of the sureties. Plaintiff appealed.

D. H. Emery, for the appellant.

Cole, McVey & Cheshire, for the appellees.

⁵⁷ GIVEN, J. 1. The court gave an instruction as follows: "The defendant Daugherty, in this case, is liable for the amount claimed. It appears from the uncontradicted testimony that the plaintiff in this case had a landlord's lien upon said premises and property thereon; that he failed and refused to pursue this lien, as against the property of the defendant Daugherty. If the said plaintiff knew that the said Mills and Ross were simply sureties upon said contract of lease at the time said contract was made, up to the time said ⁵⁸ sixty thousand brick were due and payable, then it was his duty to have enforced his landlord's lien. The only question for you to determine, then, is whether or not the said plaintiff knew that said Mills and Ross were sureties for said Daugherty. If the defendants have proved, by the preponderance of testimony, that the plaintiff knew said Mills and Ross were sureties for the defendant Daugherty, and the plaintiff had such knowledge in September, 1886, then your verdict will be for defendants Mills and Ross. If it is not so proved, then your verdict will be for the plaintiff. A surety is one who becomes responsible for the debt of another."

The only instructions given were the usual ones as to preponderance of evidence and credibility of witnesses. In this instruction the court accepts it as established that the plaintiff had a landlord's lien "upon said premises and property therein," and that he failed to pursue it, and instructs that if the jury finds that the appellant knew in September, 1886, that Mills and Ross were sureties, they should find for them. Conceding all that is assumed in this instruction, we have the question whether the appellant's failure to pursue his landlord's lien releases the sureties, as to any part of the debt. It is unquestionably the law that a surety is entitled to the benefit of all securities in the hands of the creditor, and if such securities, or any part thereof, are lost by his fault, without the consent of the surety, the surety is exonerated to that extent. In *Sherraden v. Parker*, 24 Iowa, 28, the rule is stated as follows: "In view of the peculiar relations in which the surety stands to the principal and creditor the doctrine must be that the surety may claim his release when

the creditor surrenders any hold or waives any right in the lien which would have resulted in the discharge of the debt. Thus, in *Kuhns v. Westmoreland Bank*, 2 Watts, 136, it is held that if a levy be withdrawn, or other securities abandoned, to the injury of ⁵⁹ the surety, and without his consent, he will have an undoubted right to protection." In *Burr v. Boyer*, 2 Neb. 265, it was held that a "surety will be discharged by the neglect of the creditor to have a chattel mortgage recorded that was made to him by the debtor to secure the debt, if such neglect occasion a loss of the security": See, also, *Toomer v. Dickerson*, 37 Ga. 428. The reason upon which the rule is grounded is that whatever security the creditor holds is for the benefit of the surety, as well as for himself, and, if it be lost through the fault of the creditor, he must bear the loss. Cases within this rule are clearly distinguishable from cases where A, holding the obligation of B, on which C is security, fails to sue at maturity, and B thereafter becomes insolvent. In such case the creditor holds no other security than the promise of C, and is not in fault by merely failing to sue the principal, unless required by C to do so.

The appellant conceded that it is the duty of one holding an obligation against a principal and sureties to retain all collateral securities he may hold against the principal, and not voluntarily surrender them. He contends, however, that the creditor is not required "to be active, and prosecute to judgment and execution such securities, . . . and incur expense of time and money, to relieve the surety of the obligations of his contract." There are cases holding that a mere passive delay in prosecuting a remedy against a principal does not operate to discharge a surety: *Benedict v. Olson*, 37 Minn. 431; *Edwards v. Dargan*, 30 S. C. 177; *First Nat. Bank v. Homesley*, 99 N. C. 531. When, by delay, the security is lost, as by the expiration of the lien constituting the security, by the running of the statute of limitations and the like, the delay is not merely passive, but an omission where diligence is required. In *Schroepell v. Shaw*, 3 N. Y. 457, it is said: "For the ⁶⁰ defendant [creditor] to omit an act necessary to render the assignment effectual was equivalent to a surrender of the surety to the principal debtor. It was like the case of the creditor taking a mortgage upon personal property and neglecting to file it, or the omission of a creditor to protest a note held by him as collateral security, so as

to charge the indorser. In these and in similar cases a surety whose means of indemnity have been impaired by the neglect of the creditor to do what was necessary to protect the security might well insist upon his right to be discharged to the extent of the loss sustained by reason of such neglect. . . . The nature of the security required something to be done at once by the creditor to make it a valid security; and hence the law should, as it doubtless did, imply an agreement on his part to perform that act without which the security was invalid. An omission to do this would be gross neglect in an agent, bailor, or trustee, and would be a breach of good faith on the part of the creditor toward the surety."

A landlord's lien is clearly a security given to and held by him for the payment of the rent. It is as much a security held by him as would be a mortgage taken to secure the same payment, and we see no good reason why the rules stated above do not apply to both forms of security alike. It is argued that the purpose of landlords in requiring personal security is that they may avoid harassing their tenants by attachments. The same might be said in any other case where security is taken in addition to personal security. The security afforded by a landlord's lien inures to the benefit of the personal surety, the same as any other security held by the creditor; and it may be because of this lien given by the statute that individuals are the more ready to stand as sureties for the payment of rent. Our conclusion is that, when a creditor holds a landlord's lien for the debt due to him, it is a security; and ⁶¹ if, through his act or neglect, that security is lost, in whole or in part, without the consent of a personal surety, it works a discharge of the personal surety, to the extent of the security lost.

2. It will be observed that only one of the defenses set up by the appellees was submitted to the jury. There was evidence tending to support the defense of a new agreement and extension of time. We think that issue should have been submitted; but as this omission is without prejudice to the appellant, we do not further consider it.

The instruction given assumes that the appellant had a landlord's lien "upon said premises and property thereon," and failed and refused to pursue it. The record does not justify these assumptions. The answer only claimed that the appellant had a lien upon the sixty thousand bricks; and yet the instruction declares that he had a lien upon the premises,

and property thereon of the defendant Daugherty, instead of limiting it to the sixty thousand bricks. Whether or not he had a lien upon the bricks has not been put in question, and is therefore not determined.

A loss of securities by the fault of the creditor only releases the surety to the extent of the loss. This instruction assumes that the loss in this case was to the full amount of the debt. The amount of the loss depends upon the extent of the lien, and the value of the property to which it attached. The lien was for the rent of the entire term: *Gilbert v. Greenbaum*, 56 Iowa, 211. It was for the jury to find the amount of the loss. All that the law required of the appellant was the exercise of reasonable diligence in preserving his lien. What would be reasonable diligence depends upon the facts and circumstances. So long as he had no reason to anticipate loss by delay, he was not bound to proceed, nor was he bound to bring an action, if the ⁶² amount of property covered by the lien did not justify it. There was evidence tending to show that the appellant had no reason to anticipate a loss of the bricks by delaying, and that all the bricks were sold and removed by the latter part of October, 1886. Whether it was the duty of the appellant to enforce his landlord's lien was a question that should have been submitted to the jury. It is not the law that the sureties are entitled to be exonerated merely because he did not enforce it. He must have been negligent in not doing so, and loss resulted from his negligence.

For the errors pointed out the judgment of the district court is reversed.

SURETYSHIP—IMPAIRING SURETY'S REMEDY.—A surety is discharged by the creditor's surrender of collateral security held for the same debt, either *pro tanto* or according to the value of the security if surrendered without his consent, but not otherwise: *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685, and note; *Baker v. Briggs*, 8 Pick. 122; 19 Am. Dec. 311, and note; *Cullum v. Emanuel*, 1 Ala. 23; 34 Am. Dec. 757, and note; *Springer v. Toothaker*, 43 Me. 381; 69 Am. Dec. 66, and note. A surety is discharged if the creditor having the means of satisfaction, actually or potentially, in his hands refuses to retain it: *Lichtenthaler v. Thompson*, 13 Serg. & R. 157; 15 Am. Dec. 581, and note. Where a creditor omits to do an act when required by the surety which he is bound to do as to the surety, and the omission is injurious to the surety, the latter is discharged, and may set up such conduct of the creditor as a defense at law: *King v. Baldwin*, 17 John. 384; 8 Am. Dec. 415, and extended note. See, also, the extended note to *Scott v. Fisher*, 28 Am. St. Rep. 692.

SURETYSHIP—RIGHT OF SURETY TO SECURITIES IN HAND OF CREDITOR. A surety is entitled to the appropriation of collateral security held by the creditor for the same debt to the payment thereof: *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119; 41 Am. Dec. 685.

SMITH v. SMITH.

[87 IOWA, 92.]

PARTNERSHIP—THE RIGHT OF FIRM CREDITORS TO PAYMENT OUT OF FIRM ASSETS.—The creditors of a firm have no lien on, or equity in, the partnership property. Therefore, with the consent of the partners it may be applied to the payment of their individual debts though the firm is then insolvent. The partnership creditors are not entitled to set aside such payment as fraudulent as against them.

PARTNERSHIP.—A MORTGAGE MADE BY THE MEMBERS OF A PARTNERSHIP on the firm property to secure the individual debt of one of its members is not fraudulent as against creditors of the firm, and they are not entitled to have it vacated because its enforcement will prevent the firm property from being applied to the satisfaction of the firm obligations.

SUIT to foreclose a certain chattel mortgage made by a partnership consisting of Ernest and O. D. Smith, and to have such mortgage declared paramount to a mortgage made by the said parties in favor of defendant Sarah Archer, and to sundry attachments levied by the other defendants. Certain of the defendants deposited in court the amount of the Sarah Archer mortgage as authorized by chapter 117 of the statutes of 1886, with a notice that they would contest the validity of the mortgage. A decree was entered in favor of the defendants declaring plaintiff's mortgage void as against the creditors of the firm, and from this decree the plaintiff appealed. The Sarah Archer mortgage was declared valid, and the creditors appealed.

Willard & Willard, and W. R. Green, and Nash, Phelps & Green, for the appellants.

L. L. De Lano, and Green, Warple & Baxter, for the appellees.

⁹⁵ GIVEN, J. 1. We first consider the case as presented on the plaintiff's appeal. The contentions thereby presented are between the plaintiff and the attaching creditors. It is not questioned but that the plaintiff's mortgage is valid and binding upon Smith Brothers, nor that it is prior in point of date to the mortgage to Sarah Archer and to all attachments.

The contention is whether the plaintiff is entitled to priority, as to the firm's property, over creditors of the firm. In 1884 the defendants Ernest and O. D. Smith were each indebted to their father, the plaintiff, then and ⁹⁶ since a resident of the state of New York, for which indebtedness each executed to the plaintiff a promissory note. In May, 1888, Ernest and O. D. Smith formed the partnership of Smith Brothers for the purpose of carrying on a retail store at Brayton, Audubon county, Iowa. On the fifth day of October, 1888, the notes to the plaintiff being past due, a note of the firm of Smith Brothers was, with consent of both partners, executed and delivered to the plaintiff for the amount of both former notes, and they were surrendered to the makers. On January 4, 1889, the plaintiff, having through his brother, then residing in Iowa, requested payment or security, Smith Brothers, with the consent of both members, executed to the plaintiff the mortgage in question, covering all the property of the firm, to secure the firm note previously given. There is no question but that the defendants Ernest and O. D. Smith were each individually indebted to the plaintiff, and that this indebtedness was the only consideration for the note and mortgage of the firm. We are in no doubt but that note was executed to the plaintiff, and also at the time the the firm of Smith Brothers was insolvent at the time the firm mortgage was given. The value of the assets of the firm was then two thousand five hundred dollars. Neither party owned other property of any considerable value. The liabilities of the firm to these attaching creditors were alone greater than the value of the assets, and if we add the two hundred and sixty-two dollars and seventy-five cents due to Mrs. Archer, and the two thousand two hundred and ninety-nine dollars and fifty-six cents due to the plaintiff, it is apparent that not only the firm, but each member thereof, was largely insolvent at the times the note and mortgage were given. The partners must then have known that they were insolvent, but it does not appear that the plaintiff had such knowledge at the time he received either the note or the mortgage. ⁹⁷ He was a resident of another state, had not been in Iowa, and, so far as it appears, had no reason to believe that Smith Brothers were not acting in good faith toward all their creditors. We are in no doubt, from the evidence, but that the plaintiff received the note and mortgage in good faith.

The plaintiff contends that the partnership of Smith Brothers had a right with the consent of both partners to assume the individual debt of the members, and to mortgage the partnership property as security therefor, and that by executing the note and mortgage to him the indebtedness became a debt of the firm, and he a creditor thereof, and entitled to all the rights of such a creditor. These attaching creditors do not dispute the right of a solvent partnership to so dispose of its assets, nor do they claim to have had any lien upon the property at the time the mortgage was given. Their contention is that, the firm being insolvent, they had a right to preference in the firm's assets, as against creditors of the individual partners, and that, as no consideration passed to the firm for assuming these debts of the partners, the giving of this mortgage was a fraud upon them, and that as to them the same is void. In the view that we take of the case it is not required that we determine whether the plaintiff became a creditor of the firm or not.

The question is whether these attaching creditors were, at the time the mortgage was given, entitled to such preference in the property of the partnership as that they are entitled to priority over the mortgage. There are but few contentions that have been more productive of decisions by the courts and comments by authors than these disputes between creditors of partnerships and creditors of the partners. It is not practicable or necessary that we note all the cases cited, or attempt to reconcile apparent conflicts. An ⁸⁸ examination of the cases in the light of the issues and facts in each will show that on points decided they are not at variance with the well-established rules of the law on this subject.

The law is well settled that in the absence of contract, judgment, or levy, creditors of the firm have no lien upon its property; that while the firm is in existence, and no lien has attached, it may, in good faith and for value sell its property, and when so sold it will not be followed by any claim, in law or equity, of the creditors of the firm: *City of Maquoketa v. Willey*, 35 Iowa, 323. The contention under consideration is fully answered in *Pool v. Seney*, 66 Iowa, 502, wherein the question was, as here, whether mortgages given upon the firm's assets were fraudulent *per se*, as against the creditors of the partnership. The court says: "Where the assets of a partnership have gone into equity for distribution, the rule, undoubtedly, is that they will first be applied to the satis-

faction of the debts of the partnership, and the separate creditors of the members of the firm can seek indemnity only from the surplus after the satisfaction of the partnership debts: *McCulloh v. Dashiell*, 1 Har. & G. 96; 18 Am. Dec. 271; *Murray v. Murray*, 5 Johns. Ch. 60; *Murrill v. Neill*, 8 How. 414. This rule, however, is for the benefit of the partners. Each partner is individually liable for the debts of the partnership, but he has the right to have the property of the firm applied to their satisfaction. The creditors of the firm have no lien on, or equity in, the partnership property. Their right is simply to have the judgments which they may obtain on their claims satisfied out of the partnership property, or the individual property of the partners. As the rule exists for the protection of the partners, they may waive its benefits, and when they have done this the creditors have no grounds of complaint. This doctrine has been frequently recognized and affirmed by this court: See *Scudder v. Delashmut*, 7 Iowa, 39; 71 Am. Dec. 428; *Hawkeye Woolen Mills v. Conklin*, 26 Iowa, 422; *City of Maquoketa v. Willey*, 35 Iowa, 323; *George v. Wamsley*, 64 Iowa, 175. See, also, *Ladd v. Griswold*, 4 Gilm. 25; 46 Am. Dec. 443." See, also, *Case v. Beauregard*, 99 U. S. 119.

If it may be said that, this case being in equity, the assets of this partnership are in equity for distribution, they must surely be distributed with due regard to rights which had attached before they were brought into equity. We have seen that while the firm was in existence, and in full possession of the property, free from any lien, with the right to dispose of the same, with the consent of both partners, for value, and without any intentional fraud, they executed to the plaintiff the note and mortgage in suit, thereby waiving their right to have the mortgaged property first applied to the satisfaction of the debts of the partnership. We have also seen that the plaintiff received this note and mortgage in good faith and for value. The partners having thus waived their right, it cannot be invoked on behalf of the creditors of the firm. Among the many cases cited are the following Iowa cases, referred to by the attaching creditors, which we should notice, namely: *Switzer v. Smith*, 35 Iowa, 269; *Gordon v. Kennedy*, 36 Iowa, 167; *Cox v. Russell*, 44 Iowa, 556; *Fargo v. Ames*, 45 Iowa, 491. It is sufficient to say of these cases, and those cited therein, that the question before us was either not involved, or not discussed and considered, and that

in neither of them did the partners waive their right to have the partnership property first applied to the payment of partnership debts, as was done in this case. We reach the conclusion that these attaching creditors did not have such right or interest in the property of the partnership, at the time it was mortgaged to the plaintiff, as to entitle them to preference over that mortgage.

2. The mortgage to Sarah Archer was executed January 7, 1889, by Smith Brothers and both members ¹⁰⁰ of the firm, on all the merchandise of the firm, subject to the mortgage to the plaintiff, to secure two promissory notes previously given. One note was given November 10, 1887, by Ernest Smith, with O. D. Smith as surety, for one hundred and fifty dollars borrowed money, due four months after date, and is unquestionably the individual debt of Ernest Smith. There is testimony showing that part of the money borrowed was put into the firm's business by Ernest Smith, but this fact does not make it a debt of the partnership. The other note was given December 7, 1888, by the firm, for one hundred dollars loaned to it, due ninety days after date, and is unquestionably a debt of the partnership. Sarah Archer, hearing that the mortgage had been given to the plaintiff, called upon Smith Brothers to know what she should do about her pay. She was informed that they had no money, but would give her a second mortgage on their merchandise; and thereupon, and without other consideration than the pre-existing indebtedness, the mortgage in question was executed. There is no evidence of fraud, intentional or otherwise, upon the part of either party to this mortgage. It follows from what we have said as to the plaintiff's mortgage that this mortgage is valid, regardless of whether the indebtedness secured thereby was that of the firm, or of the individuals composing it, or of both. The attaching creditors are not entitled to preference over this mortgage.

3. The record discloses that one Bradley intervened, claiming certain articles of merchandise, of which he was adjudged to be the owner, and entitled to possession. No question is made as to this part of the judgment.

It follows from the conclusions that we have reached that the plaintiff is entitled to decree declaring his mortgage a first lien upon the property described ¹⁰¹ therein; that Sarah Archer is entitled to decree foreclosing her mortgage for the full amount due thereon, and that the same be de-

clared a second lien. That Gilman & Ruhl and Turner & Jay, having complied with chapter 117 of the acts of 1886, are subrogated to all the rights of Sarah Archer under said mortgage, and under said chapter 117, to have their judgments against Smith Brothers declared a third lien upon the proceeds of said property. The other attaching creditors are entitled to preference in the order in which the attachments were levied in their favor against Smith Brothers. The case will be remanded for decree in conformity with this opinion.

Reversed on plaintiff's appeal, and affirmed on the appeal of Warfield & Howell, Spangler, Eroo & Co., and Doggett, Bassett & Hills Company.

Partnership Creditors, Rights and Remedies of.

General Rule.—The creditors of a partnership, in the enforcement of their rights by any action or proceeding at law, may pursue precisely the same remedies as if their cause of action were against a single individual, or against persons between whom no partnership relation had ever existed. Each of the partners is answerable for the obligations of the partnership, and while, in the absence of statutes making his liability several, as well as joint, he can ordinarily only be sued when his copartners are made parties with him, yet the property, which may be reached by attachment or execution against the partnership, includes the individual or separate property the partners, or of any of them, as well as the property of the partnership; and a writ levied upon the property of a partner for a partnership debt cannot be overreached by a writ subsequently levied upon such property for his personal or individual debt. In equity, however, a different rule prevails, at least as to equitable assets. We do not mean to assert that equity will deprive a partnership creditor of a lien acquired by his diligence at law in seizing upon the individual property of a partner, or in otherwise securing a lien thereon for the satisfaction of a partnership obligation. When the partnership creditors or creditors of one member only of the partnership are calling upon a court of equity for its assistance, and funds or other property are within the control of the court for distribution, partnership creditors are usually considered as having paramount rights in the partnership assets, and the individual creditors of each partner as having such right in his individual or personal assets, so that the partnership property will not be awarded to individual creditors until the partnership obligations are satisfied, and the individual property of the several partners will not be appropriated to the satisfaction of the partnership obligations until his individual creditors have been paid. The rule upon this subject, its history, and the fluctuations in its application were thus stated in a leading case in the supreme court of the United States: "This rule may be traced back in England, with certainty, to the cases of *Ex parte Crowder*, 2 Vern. 706 (in 1715), and of *Ex parte Cook*, 2 P. Wms. 500 (in 1728) nearly a century and a half since. It was affirmed by Lord Hardwicke in *Ex parte Hunter*, in 1 Atk. 228 (in 1742), and continued unchanged until the year 1785, when a material innovation was made upon it by Lord Thurlow, in the case of *Ex parte Hodgson*, 2 Brown Ch. 5. By the decision last men-

tioned, the established practice, then of sixty years, was so changed, and the distinction between joint and separate creditors so broken up, that the former were permitted to come in and to receive dividends *pari passu* with the latter from the separate estate. This change led to the practice of filing a bill on behalf of the separate creditors, to restrain the order in bankruptcy whenever there was a joint estate, and, by this means the rights of the joint and separate creditors on their respective funds were maintained, a proceeding which could rest on no other foundation than the peculiar equities of these different parties with respect to the funds with which they have been respectively connected. In consequence of the inconvenience of Lord Thurlow's rule, and of the injustice it was thought to involve, Lord Loughborough re-established the practice that had so long previously existed, with the single modification of permitting the joint creditors to prove under a separate commission; but denying to them any right to dividends, until after the separate creditors were satisfied. The reasoning of his lordship, as going to show that his decision is founded in pure principles of equity, is peculiarly forcible. Speaking of the rule of Lord Thurlow, he says: 'The difficulty that has struck me upon it is, that what I order here sitting in bankruptcy, I shall forbid to-morrow sitting in chancery; for it is quite of course to stop the dividend upon a bill filed. The plain rule of distribution is, that each estate shall bear its own debts. The equity is so plain, that it is of course upon a bill filed. The object of the commission is to distribute the effects with the least expense. Every order I make to prove a joint debt on a separate estate must produce a bill in equity. It is not fundamentally a just distribution, nor a convenient distribution. Every creditor of the partnership would come upon the separate estate. The consequence would be, the assignees of the separate estate must file a bill to restrain the dividend upon all these proofs, and make the partners parties. But there is another circumstance. It is a contrivance to throw this upon the separate estate.' Again, his lordship says: 'It is not stated as a case where there are no joint funds. Here it is only that there are two funds. Their proper fund is the joint estate, and they must get all they can from that first. I have no difficulty in ordering them to be permitted to prove, but not to receive a dividend.' This doctrine of Lord Loughborough, deduced, as he tells us, not less from fundamental principles of equity than from convenience in the administration of bankrupts' estates, appears to have been followed in England ever since": *Murill v. Neill*, 8 How. 425. The rule thus stated has been generally maintained and applied in the United States as well as in England: *Ex parte Elton*, 3 Ves. 238; note to *McCulloh v. Dashiell*, 18 Am. Dec. 280; *Black's Appeal*, 44 Pa. St. 503. In some of the states are statutes which adopt the rule of equity to the extent of applying it to proceedings at law, or which, at least, do not permit the creditors of the partnership to proceed against the individual partners by virtue of a judgment against the partnership, but require them, after obtaining a judgment against the firm, to institute a further proceeding to reach the separate property of the partners: *Haskins v. Alcott*, 13 Ohio St. 210; *Leach v. Milburn W. Co.*, 14 Neb. 106. These special statutes, departing from the general rules of law upon the subject, we cannot undertake to consider at length or in detail in this note.

Proceedings at Law Against the Separate Property of a Partner.—Unless some statute has made necessary a special proceeding to reach the separate property of a partner there is no doubt that an execution, at-

attachment, or other writ commanding the officer to seize upon property and to hold or sell it for the satisfaction of the plaintiff can be levied upon the property of either partner as well as upon the property of the firm, and that such levy cannot at law be displaced or impaired by the fact that the debt or judgment upon or for which the writ issued was one due from a partnership: *Hassell v. Griffin*, 2 Jones Eq. 117; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687; *McCulloh v. Dashiell*, 1 Har. & G. 96; 18 Am. Dec. 271. Under the operation of this rule a levy and sale of the separate property of a partner, under an execution against the firm, takes precedence over a subsequent levy upon the same property under a writ against such partner alone, based upon a judgment, attachment, or other claim against him individually. Nor can a creditor of the partner individually avoid this result by resorting to proceedings in equity for the purpose of depriving a partnership creditor of the precedence which he has acquired by virtue of his legal lien. The rule that individual creditors are preferred as to the individual estate of a partner, and partnership creditors as to the partnership estate, is not a rule of such controlling force as to deprive, or to authorize a court to deprive, a party of a legal lien or of a legal title. Therefore, if a creditor of a partnership who has acquired a lien by execution, attachment, or otherwise against the separate property of a partner, or has obtained title to such property under an execution sale or by virtue of a voluntary transfer made by the partner, either in satisfaction of a partnership obligation, or to create a fund out of which such obligation may be realized, equity will not interpose at the instance of an individual creditor either to cancel or to compel the relinquishment of the lien, or the surrender of the property, or a resort to partnership assets in preference to the separate estate of the partners, or either of them: *Bowker v. Smith*, 48 N. H. 111; 2 Am. Rep. 189; *Cleghorn v. Insurance Bank*, 9 Ga. 319; *Wisham v. Lippincott*, 9 N. J. Eq. 353; *Straus v. Kerngood*, 21 Gratt. 584; *Allen v. Wells*, 22 Pick. 450; 33 Am. Dec. 757; *Meech v. Allen*, 17 N. Y. 300; 72 Am. Dec. 465; *Crook v. Rinolskopf*, 105 N. Y. 476; *Haralson v. Campbell*, 63 Ala. 278; *Leinkauff v. Munter*, 76 Ala. 194; *Bray v. Seligman*, 75 Mo. 31; *Saunders v. Reilly*, 105 N. Y. 21; 59 Am. Rep. 472; *Elgin N. W. Co. v. Meyers*, 30 Fed. Rep. 659; *Stevens v. Perry*, 113 Mass. 380; *Gillaspie v. Peck*, 46 Iowa, 461; *Howell v. Teel*, 29 N. J. Eq. 490; *Fullam v. Abrahams*, 29 Kan. 725; *Newman v. Bagley*, 16 Pick. 570; *Kuhne v. Law*, 14 Rich. L. 18; *Gallagher's Appeal*, 114 Pa. St. 353; 60 Am. Rep. 350; *Cummings' Appeal*, 25 Pa. St. 268; 64 Am. Dec. 695; *Lord v. Devendorf*, 54 Wis. 491; 41 Am. Rep. 58. An exception to this exists in New Hampshire, in which state the rule that individual property shall first be applied to the satisfaction of individual debts appears to prevail in proceedings at law, and to entitle an individual creditor, in whose favor a writ issued upon a judgment for a separate debt of a partner, to precedence over an extent previously made on the lands of such partner under a writ against the partnership: *Jarvis v. Brooks*, 23 N. H. 136.

Rights to Separate Property of Partner in Equitable Proceedings.—As we have shown in the preceding paragraph, according to the rules generally prevailing, partnership creditors are entitled to the same remedies at law against any member of the partnership as are his individual creditors. The question remaining for consideration is with respect to the rights of partnership creditors in proceedings in equity, and in such other tribunals as have for their guidance in that regard substantially adopted the rules of equity jurisprudence.

Upon the death of any member of a partnership the whole legal liability remains with the surviving members, against whom all actions at law must be brought. In such actions a partnership creditor cannot pursue the administrator or other representative of the deceased partner: *Childs v. Hyde*, 10 Iowa, 294; 77 Am. Dec. 113, and note; *McLain v. Carson*, 4 Ark. 164; 37 Am. Dec. 777; *Sherman v. Kreul*, 42 Wis. 33. For the purpose of proceedings at law the remaining partners are the only debtors. In equity it was otherwise, and the authorities agree that, at least when the remedies at law are inadequate, the partnership creditor may seek satisfaction in equity by a suit against the representatives of a deceased partner. According to the views of the English courts of chancery a partnership obligation is in equity several as well as joint, and therefore, upon the death of either partner, a partnership creditor may proceed in equity to obtain satisfaction from the personal representative of the decedent, and while in the suit the surviving partner must be made a party, yet no relief need be asked against him, nor need it be shown that he is insolvent, or that the firm assets are not ample for the payment of the obligation in question: *Devaynes v. Noble*, 2 Russ. & M. 495; *Wilkinson v. Henderson*, 1 Mylne & K. 582; *Thorpe v. Jackson*, 2 Younge & C. 553; *In re Hodgson*, L. R. 31 Ch. Div. 177. This rule has been adopted without judicial dissent, so far as we are aware, in England, but in America has met with serious opposition, and while it has been accepted and enforced by the supreme court of the United States, and by the highest appellate tribunals in several of the states (*Nelson v. Hill*, 5 How. 127; *Lewis v. United States*, 92 U. S. 618; *Blair v. Wood*, 108 Pa. St. 278; Story's Equity Jurisprudence, sec. 676; *Fillyau v. Lavery*, 3 Fla. 72; *McLain v. Carson*, 4 Ark. 164; 37 Am. Dec. 777; *Postlethwait v. Howes*, 3 Iowa, 365; *Sampson v. Shaw*, 101 Mass. 145; 3 Am. Rep. 327) it has been repudiated by a majority of the state courts. In the states thus dissenting a partnership creditor seeking in equity to compel payment of a partnership liability out of the estate of a deceased copartner must, in effect, show that the remedies at law are inadequate; or, in other words, that he cannot, by proceeding at law against the surviving partner and the partnership assets, obtain satisfaction of the partnership liability: *Buckingham v. Ludlum*, 37 N. J. Eq. 138; *Voorhis v. Childs*, 17 N. Y. 354; *Sherman v. Kreul*, 42 Wis. 33; *Pope v. Cole*, 55 N. Y. 124; 14 Am. Rep. 198; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *Alsop v. Mather*, 8 Conn. 584; 21 Am. Dec. 703; *Pearson v. Keedy*, 6 B. Mon. 128; 43 Am. Dec. 160; *Troy I. N. F. v. Winslow*, 11 Blatchf. 513; *Pullen v. Whitfield*, 55 Ga. 174; *Morrison v. Kurtz*, 15 Ill. 193; *Adams v. Sturges*, 55 Ill. 468.

If proceedings are instituted in equity to charge the estate of a deceased partner with the payment of a partnership debt, or if, by any other means, courts of equity have jurisdiction so that it becomes their duty to apply the partnership property or the property of an individual member of a partnership to the payment of a partnership obligation, and a conflict of interest arises between the creditors of the partnership and the creditors of a single member thereof, and it appears that the property out of which payment is to be made is insufficient, and some loss must result to one or both of these several classes of creditors, then the rule generally prevailing is that each class of assets shall be deemed to be liable for, and shall be first applied to, the satisfaction of obligations of the same class; that is, partnership assets shall first be applied to the payment of the partnership liabilities, and the separate or individual assets to the payment of the individual liabilities. Therefore, if the proceeding is against the estate of a deceased partner, and

there are both separate and partnership assets, then the individual creditors must first be paid in full before partnership creditors will be allowed to participate in the individual estate: *Crooker v. Crooker*, 52 Me. 267; 83 Am. Dec. 509; *McCulloh v. Dashiell*, 1 Har. & G. 96; 18 Am. Dec. 271; *Rodgers v. Meranda*, 7 Ohio St. 179; *Union Nat. Bank v. Bank of Commerce*, 94 Ill. 271; *Bond v. Navre*, 62 Ind. 505; *Rainey v. Nance*, 54 Ill. 29; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; 49 Am. Dec. 160; *Egherts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236; *Ladd v. Griswold*, 4 Gilm. 25; 46 Am. Dec. 443; *Warren v. Able*, 91 Ind. 107; *Bake v. Smiley*, 84 Ind. 212; *Weyer v. Thornburgh*, 15 Ind. 124. In the application of this rule, excluding the partnership creditors from the benefit of the separate estate, it must generally appear that there were also partnership assets, so that in fact there are two classes of funds or property to be applied to the satisfaction of the two different classes of creditors. Under these circumstances, though the partnership funds are of but little value, and the partnership obligations of great extent, the partnership creditors will not be allowed to pursue the separate estate of a deceased partner until his individual creditors have first been satisfied, but if, on the other hand, there are no partnership assets, the partnership creditors and the separate creditors of a deceased partner are placed upon an equality, and are entitled to share ratably in his estate: *Rodgers v. Meranda*, 7 Ohio St. 179; *Brock v. Baleman*, 25 Ohio St. 609; *Pearce v. Cooke*, 13 R. L. 184; *Grosvenor v. Austin*, 6 Ohio, 103; 25 Am. Dec. 743; *Harris v. Peabody*, 73 Me. 262; *Higgins v. Rector*, 47 Tex. 361; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200. In Indiana, however, though there are no partnership assets, the partnership creditors will not be permitted to obtain satisfaction out of the separate estate of a deceased partner until his individual creditors have been paid: *Warren v. Farmer*, 100 Ind. 593. In some of the states the mere existence of partnership assets does not entirely exclude the partnership creditors from redress against the estate of a deceased partner, though the assets of that estate are not sufficient to pay his individual liabilities. Thus, in Virginia and South Carolina, if the partnership creditors have proceeded against and exhausted the partnership assets without obtaining complete satisfaction, the balance due from them is treated as though it were the separate obligation of the deceased partner, and they are permitted to share ratably with his separate creditors in the assets of his estate: *Hutzler v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687; *Pettyjohn v. Woodruff*, 86 Va. 478; *Shackelford v. Shackelford*, 32 Gratt. 481. In Kentucky, after the partnership creditors have exhausted the partnership estate, the separate creditors are entitled to receive a like amount from the estate of a deceased copartner, and, if any thing thereafter remains, the separate and partnership creditors are entitled to a ratable participation therein: *Fayette Nat. Bank v. Kenney's Assignee*, 79 Ky. 133; *Northern Bank v. Keizer*, 2 Duvall, 169.

Bankrupts and Insolvents.—The rules of equity have with little or no exception been adopted as controlling courts having the administration of the estates of bankrupts and insolvents. Sometimes, as in the case of the late National Bankrupt Law, the equitable rule was expressly made a part of the statute. Thus section 36 in that law declared: "And, after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and, if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the

joint stock for the payment of the joint creditors; and, if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners, according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts." The equitable rule that partnership creditors shall be given precedence as to the distribution of the partnership assets, and the individual creditors in the distribution of individual assets, has been applied with great frequency, and, we believe, without dissent in the various courts of the country, state and national: *Rainey v. Nance*, 54 Ill. 29; *Peters v. Bain*, 133 U. S. 670; *Claffin v. Behr*, 89 Ala. 503; *Bates on Partnership*, sec. 825; *Harris v. Peabody*, 73 Me. 262; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 530; *Jackson I. Co. v. Purdee*, 9 Heisk. 296; *In re Knight*, 8 Nat. Bank. Reg. 436; 2 Biss. 518; *Amsinck v. Bean*, 22 Wall. 401. Courts of bankruptcy, though it has not been made a part of the statute, have also very generally adopted the rule that if there is no partnership estate, then the partnership and separate creditors are equally entitled to prove their claims against the separate estate of a partner, and to share *pari passu* in his assets: *In re Lloyd*, 22 Fed. Rep. 88; *United States v. Lewis*, 13 Nat. Bank. Reg. 33; *In re West*, 39 Fed. Rep. 203; *In re Downing*, 3 Bank. Reg. 152; 1 Dill. 33; *In re Goedde*, 6 Bank. Reg. 295 *Contra*, *In re Byrne*, 1 Bank. Reg. 122; *In re Frear*, 1 Bank. Reg. 201; 35 How. Pr. 249.

Estates in Probate.—In the greater portion of the United States, the administration and settlement of the estate of a deceased person are committed to probate or surrogate courts, in which persons having claims against such estate must present them for approval or allowance, or must seek to compel the payment thereof by pursuing the remedies designated in the statutes controlling such courts. As we have already seen, when it was necessary for creditors to resort to a court of equity to obtain satisfaction out of the estate of a decedent, if he had incurred liability, both individually and as a member of a partnership, and left an estate in both capacities, these two classes of creditors were regarded as having special rights in the assets of the business out of which their claims arose. The rule upon this subject is thus stated at pages 64 and 65 of the third volume of Kent's Commentaries: "The joint creditors have the primary claim upon the joint fund, in the distribution of the assets of bankrupt or insolvent partners, and the partnership debts are to be settled before any division of the funds takes place; *Murrill v. Neil*, 8 How. 414; *Shedd v. Wilson*, 1 Wms. 478; *Converse v. McKee*, 14 Tex. 20. So far as the partnership property has been acquired by means of partnership debts those debts have, in equity, a priority of claim to be discharged; and the separate creditors are only entitled in equity to seek payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners, after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until

private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property until all the partnership creditors are satisfied: *Walker v. Eyth*, 25 Pa. St. 216; *Morrison v. Kurtz*, 15 Ill. 193. The basis of the general rule is, that the funds are to be liable on which the credit was given. In contracts with the partnership the credit is supposed to be given to the firm, but those who deal with an individual member rely on his sufficiency." These rules have been generally accepted as controlling in probate and surrogate courts in the distribution of the assets of a decedent, and, though the statutes of the state may have made a special classification giving priority to particular classes of indebtedness, this classification will not be regarded as intended to abolish or impair the equitable rule hereinbefore stated if the decedent left both individual and partnership obligations: *Claffin v. Behr*, 89 Ala. 503; *Hundley v. Farris*, 103 Mo. 78; 23 Am. St. Rep. 863; *Wilder v. Keeler*, 3 Paige 167; 23 Am. Dec. 781; *Emanuel v. Bird*, 19 Ala. 596; 54 Am. Dec. 200; *Charles v. Eshleman*, 5 Col. 107; *Doggett v. Dill*, 108 Ill. 560; 48 Am. Rep. 565; *Fowlkes v. Bowers*, 11 Lea, 144; *Irby v. Graham*, 46 Miss. 425; *Rodgers v. Meranda*, 7 Ohio St. 192; *Smith v. Mallory*, 24 Ala. 628; *Bridges v. McCullough*, 27 Ala. 661. Those states which have modified the equitable rule, even when administered by courts of equity, have made a corresponding modification in its application to probate and surrogate courts. Thus, in Arkansas and Connecticut, we understand that neither class of creditors is entitled to any preference over the other as against the separate estate of a deceased partner: *Camp v. Grant*, 21 Conn. 41; 54 Am. Dec. 321; *McLain v. Carson*, 4 Ark. 164; 37 Am. Dec. 777; and in South Carolina, as a partnership creditor is required first to exhaust his remedies against the partnership assets, he may thereafter be permitted as to the balance remaining due him to share with the individual creditors in the separate estate of the deceased copartner: *Hutzel v. Phillips*, 26 S. C. 136; 4 Am. St. Rep. 687; *Wilson v. McConnell*, 9 Rich. Eq. 500; *Gudsen v. Carson*, 9 Rich. Eq. 252; 70 Am. Dec. 207; *Blair v. Black*, 31 S. C. 346; 17 Am. St. Rep. 30.

The Creditors of a Partnership are Entitled to Maintain Against the Members Thereof every action, suit, or proceeding which might be maintained upon a like cause of action against a single person, or against two or more persons liable jointly, though not as partners. There will, therefore, be no occasion to consider those actions, suits, or proceedings in detail. The rule in case of conflict between partnership and individual creditors has already been stated. The former are entitled to precedence over the latter in the distribution of partnership assets.

Creditors' Liens.—There are decisions which speak in general terms of the lien of partnership creditors upon the partnership assets: *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Sumner v. Hampson*, 8 Ohio, 323; 32 Am. Dec. 722; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278. The term is misleading. They do not have any lien: *Level v. Farris*, 24 Mo. App. 445; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97; *Williams v. Gage*, 49 Miss. 777; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Allen v. Center V. Co.*, 21 Conn. 130; 54 Am. Dec. 333; *Allen v. Grissom*, 90 N. C. 90; *Sickman v. Abernathy*, 14 Col. 174; nor any absolute right to have the firm assets applied to the payment of their claims. Each of the partners has, in the absence of any contract or other transaction waiving it, the right to have the firm property applied to the payment of the firm obligations, and the creditors of the firm are for many purposes deemed subrogated to this right of the partners, and therefore entitled to insist, in the absence of a

waiver of that right by the partners themselves, that the partnership property be applied to the extinction of the partnership obligations before it shall be taken for the payment of the debts of the individual partners, or of either of them.

Preferences in Favor of Partnership Creditors.—In treating of the right of partnership creditors to pursue the property of the individual partners we have already stated that the rule in chancery, or insolvency, and probate proceedings is that the property of the partnership shall be applied to the discharge of the partnership obligations before the separate creditors of either party can participate therein. Concerning the extent and application of this rule there is no controversy, provided the property of the partnership is in the custody or control of the court, and is not already charged with legal liens interfering with the claims of the partnership creditors: *Bass v. Estill*, 50 Miss. 300; *Chase v. Steel*, 9 Cal. 64; *Lucas v. Atwood*, 2 Stew. 378; *Collins v. Butler*, 14 Cal. 223; *Burpee v. Bunn*, 22 Cal. 194; *Lord v. Devendorf*, 54 Wis. 491; 41 Am. Rep. 59; *Estate of Edwards*, 122 Mo. 426; *Lovel v. Farris*, 24 Mo. App. 445; *Moody v. Lucier*, 62 N. H. 584; *Converse v. McKee*, 14 Tex. 200; *Christian v. Ellis*, 1 Gratt. 396; *Murrill v. Neill*, 8 How. 414. The rule is also applicable to assignments made for the benefit of creditors which do not contain provisions preferring any class of creditors: *Hooker's Assignment*, 75 Iowa, 377. The rule is also applicable where, though there is no partnership in fact, parties have represented themselves to be partners, and have been dealt with as such, and have created obligations binding upon them jointly, and the holders of which believed, and had reason to believe, that the transaction was with a partnership. "Persons who deal with parties representing themselves as partners in a business are entitled to have the property used in that business applied to the payment of their debts in preference to the individual debts of those representing themselves as partners. This rule may operate severely upon the individual creditors, but the contrary rule would operate just as severely upon the partnership creditors": *Van Kleeck v. Hammell*, 87 Mich. 599; 24 Am. St. Rep. 182.

The question of the greatest difficulty is whether and when the superior equity which partnership creditors have in the partnership assets can be enforced by them so that such assets may not be taken and appropriated to the satisfaction of other obligations, and be thereby forever lost to them.

As Against Individual Creditors Proceeding by Attachment or Execution, the creditors of a partnership have little to fear. Neither partner has any specific interest in any part of the property of the partnership. His only right is to have a settlement and accounting, and to be awarded his share of the assets after the partnership obligations have been paid. His interest, it is true, is subject to attachment and execution: *Reed v. Shepardson*, 2 Vt. 120; 19 Am. Dec. 697. "Confessedly, a sale under an execution against one partner does not divest the title to the partnership property. It transfers only such interest as may remain in the judgment debtor upon the settlement and adjustment of the affairs of the partnership": *Freeman on Executions*, sec. 125.

There is a conflict of decision as to the mode of levying upon the interest of a partner, and as to the effect of a sale under execution. Perhaps the weight of authority favors the view that an officer can take exclusive possession of the property levied upon, retaining it until the sale, and deliver it to the purchaser, and that he may hold it as a cotenant with the other partners, who, on their part, must take some measures to reclaim it as part of the partnership assets if necessary to the satisfaction of the partnership

obligations, but the more reasonable rule, and one rapidly gaining ground, is that a purchaser at an execution sale does not acquire a right to the possession of the property purchased, either against or jointly with the members of the firm, but only an interest in the proceeds after the business of the firm shall have been settled: *Freeman on Executions*, sec. 125. However this may be, the property still remains answerable for the partnership debts, and a writ of attachment or execution for a partnership debt takes precedence over any previous levies or sales under writs against one member of the partnership only, and a purchaser under the former writ acquires title paramount to that of a purchaser under the latter writ, irrespective of the dates of the respective levies and sales: *Cox v. Russell*, 44 Iowa, 556; *Switzer v. Smith*, 35 Iowa, 269; *Williams v. Gage*, 49 Miss. 777; *Washburn v. Bank of Bellows Falls*, 19 Vt. 278; *Roop v. Herron*, 15 Neb. 73; *Watt v. Johnson*, 4 Jones, 190; *First Nat. Bank v. Brenneisen*, 97 Mo. 145; *Pierce v. Jackson*, 6 Mass. 242; *Powers v. Large*, 69 Wis. 621; 2 Am. St. Rep. 767; *Coover's Appeal*, 29 Pa. St. 9; 70 Am. Dec. 149; *Conroy v. Woods*, 13 Cal. 626; 73 Am. Dec. 605.

The right of the partnership creditors to have the partnership property applied to the satisfaction of the partnership debts is, as we have already remarked, dependent upon the equity of a member of a partnership to have such application made, and if by any means there is no member of the partnership retaining this equity, then the equity of the partnership creditors which is dependent upon it is lost. This, as we shall hereafter see, is often the result of a sale or disposition of property made as the joint act, or by the mutual consent of all the partners. A like result appears to follow a voluntary transfer of their respective interests. Hence, it has been held that if, under an execution based upon a joint debt of the partners, though it is not a partnership obligation, a sale is made of partnership property, the purchaser acquires an absolute title which cannot be overreached by any proceeding taken in behalf of the partnership creditors. In determining this question the court of appeals of New York said: "Upon the facts of this case it is entirely clear that Tooker and Irwin could have taken their firm property and applied it upon this joint judgment against them; and, inasmuch as they had the power and right to do that, they could have turned it out to the sheriff when he came with the joint execution against them; and, as they could have turned it out upon the debt before judgment, or upon the execution after judgment, there can be no reason to doubt that the sheriff could take and sell it upon the execution free from the claim of their firm creditors. After this sale of the firm property upon a joint judgment against both members of the firm no equity was left in either member of the firm to have the property thereafter applied in discharge of the firm debts. Having been applied in discharge of the joint debt against both members of the firm all the equities of both members in the property, as against each other, were wiped out; and it is only through the equity which one member of a firm has in the firm property, or against his copartners, that firm creditors, on the principle of subrogation, can enforce their claims against the firm property": *Saunders v. Reilly*, 105 N. Y. 12; 59 Am. Rep. 472.

Disposition of Property by Partners.—While the creditors of the partnership are protected from the claims of the creditors of a single member in the manner hereinbefore indicated, and while equity will grant such further aid as may be necessary to prevent the partnership assets from being taken in the satisfaction of the debts of any separate member of the partnership.

under an execution or attachment against him, it is more difficult to protect the partnership creditors against the acts of the partners themselves. While the partnership is in the active management of its affairs its members acting as a partnership have a very general power to dispose of its effects, and there is no question that they may appropriate the firm assets to the satisfaction of the partnership obligations, and, in so doing, may prefer one of their creditors to others, or may, in the absence of statutory prohibition, execute a formal assignment for the benefit of their creditors, in which some of such creditors may be preferred to others: *Bulger v. Rosa*, 119 N. Y. 459; *Jones v. Smith*, 31 S. C. 527. The partnership creditors have no lien on the property of the firm while the partners are administering its assets and lawfully conducting its affairs: *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 570. It follows that they may sell the property on such terms as to them seem best, provided there be no fraudulent intent, and may devote the proceeds to any lawful purpose, and that the creditors cannot reclaim them.

Partner's Disposal of Property for Individual Debts.—It has been insisted with much force that an appropriation of partnership property to the payment of the debts of an individual partner is, in effect, a gift to him, and must, at least, when the partnership is not able to pay its debts, naturally tend to hinder, delay, and defraud its creditors, and therefore that a lien created against the firm property to secure a debt due from one of its members, or any payment or appropriation of such property in satisfaction of such debt, or any assignment for the benefit of creditors which shall give preference to individual creditors or authorize the payment out of the proceeds of such assignment to any of such creditors before the partnership obligations are fully satisfied, is fraudulent and void as against the creditors of the partnership, and therefore subject to be treated as any other fraudulent transfer or lien: *Wilson v. Robertson*, 21 N. Y. 587; *Patterson v. Seaton*, 70 Iowa, 689; *Booss v. Marion*, 129 N. Y. 536; *Atlas Nat. Bank v. More*, 40 Ill. App. 336; *Bernheimer v. Rindskopf*, 116 N. Y. 428; 15 Am. St. Rep. 414; *Menagh v. Whitwell*, 52 N. Y. 146; 11 Am. Rep. 683; *Rothell v. Grimes*, 22 Neb. 526; *Edwards' Estate*, 47 Mo. App. 307; *Heineman v. Hart*, 55 Mich. 64; *McIntire v. Yates*, 104 Ill. 491; *Arnold v. Hagerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712. If, however, the partnership is at the time solvent and able to pay its debts, there can be no doubt of the power of the partners to devote the firm property to the payment of the separate liabilities of any member, and that the partnership creditors have no cause of action, either at law or in equity, though it may subsequently turn out that their ability to collect their partnership demands has been substantially impaired by the appropriation thus made for the benefit of the creditors of a single partner: *Hage v. Campbell*, 78 Wis. 572; 23 Am. St. Rep. 422; *Woodmansie v. Holcomb*, 34 Kan. 35; *Jewett v. Meech*, 101 Ind. 289. On the other hand, there may be cases in which the partnership property has been devoted to the payment of the debts of a single member of the partnership under such circumstances that the court may be of the opinion that the transaction was tainted with actual fraud, and may, therefore, grant relief to the partnership creditors: *Pool v. Gramling*, 88 Ga. 653. The more difficult question has reference to those cases in which the separate creditor of an individual partner has received partnership property in satisfaction of his demand, or has had such property pledged to him to secure such debt, or there has been made an assignment by the partners of the property, either preferring their individual creditors, or directing payment to them, or some of them, before

the partnership obligations shall be entirely satisfied. It is clear, we think, that the majority of the courts do not agree in the view that the appropriation by a partnership of its property to the discharge of an individual debt of one of its members is necessarily a fraudulent transfer. It is conceded that a partnership creditor does not as such have any lien on the partnership assets. It seems to follow from this concession that such assets must be subject to such contracts and liens respecting them as may have received the assent of all the copartners: *Spratt v. First Nat. Bank*, 84 Ky. 85; *Sickman v. Abernathy*, 14 Col. 174; *Smith v. Smith*, 87 Iowa, 93; *ante*, p. 359; and, therefore, the courts sustain liens created against partnership assets for the payment of an individual debt of any member with the concurrence of the others, and also such payments as may have been made by a like concurrence out of the firm funds for the satisfaction of an individual debt, as well as assignments for the benefit of creditors and other transfers by which an individual creditor may have been preferred to the partnership creditors: *Goddard P. G. Co. v. McCune*, 122 Mo. 426, 431; *Schmidlapp v. Currie*, 55 Miss. 597; 30 Am. Rep. 534; *Huiskamp v. Moline W. Co.*, 121 U. S. 310; *Purple v. Farrington*, 119 Ind. 164; *Coffin v. Day*, 34 Fed. Rep. 687; *Winslow v. Wallace*, 116 Ind. 317; *Fisher v. Syfers*, 109 Ind. 514; *Allen v. Grissom*, 90 N. C. 90; *Sigler v. Knox County Bank*, 8 Ohio St. 511; *Rice v. Barnard*, 20 Vt. 479; 50 Am. Dec. 54; *Currer Gin etc. Co. v. Bannon*, 85 Tenn. 712; 4 Am. St. Rep. 803; *Hanover Bank v. Klein*, 64 Miss. 141; 60 Am. Rep. 47. *Contra*, *Anderson v. Norton*, 15 Lea, 14; 54 Am. Rep. 400. We had understood the supreme court of Iowa to dissent from this rule. It appears, on the contrary, to have fully adopted it in the principal case, at least, so far as may be necessary to protect individual creditors dealing with a partnership in good faith and without notice of its insolvency.

Partner's Application of Firm Property to His Personal Debts.—Each partner in the transaction of partnership business is an agent for and authorized to represent the firm. He has not, however, an implied authority to apply the property of the firm to the satisfaction of other than firm obligations, and hence is not justified in making a payment of his individual debts out of the firm funds or by a transfer of the firm property: *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373, and note; *Janney v. Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460; *Farwell v. St. Paul*, 45 Minn. 495; 22 Am. St. Rep. 742. If an individual creditor received firm money or property with notice that it was partnership assets there is no doubt that he has no right to retain it either as against the partners or the partnership creditors. Whether he may retain it when it was received by him in good faith and without knowledge of the source whence it came is a question respecting which the authorities are somewhat evenly divided, the one side insisting that his good faith is a protection to any proceeding against him to recover the money or property so received: *Locke v. Lewis*, 124 Mass. 1; 26 Am. Rep. 631; *Davies v. Atkinson*, 124 Ill. 474; 7 Am. St. Rep. 373; *Johnson v. Crichton*, 56 Md. 108; *Stegull v. Coney*, 49 Miss. 761; *Carter v. Galloway*, 36 La. Ann. 730; and the other that "his right depends not upon his knowledge that it was partnership property, but upon the fact whether the other partners had assented to such disposition of it or not": *Rogers v. Batchelor*, 12 Pet. 221; *Cannon v. Lindsey*, 85 Ala. 198; 7 Am. St. Rep. 38; *Liberty S. B. v. Campbell*, 75 Va. 534; *Cutlwell v. Scott*, 54 N. H. 414; *Ackley v. Staehlin*, 56 Mo. 558; *Janney v. Springer*, 78 Iowa, 617; 16 Am. St. Rep. 460.

Waiver of Partner's Lien Destroys Equity of Firm Creditors.—As a gen-

eral rule, if either partner places himself in such a position that he has no right to insist that the partnership assets be applied to the discharge of its obligations in preference to those of individual creditors, then the partnership creditors also lose their right to insist upon such application: *Case v. Beauregard*, 99 U. S. 119; *Arnold v. Hugerman*, 45 N. J. Eq. 188; 14 Am. St. Rep. 712; *Holloway v. Turner*, 61 Md. 217; *Couchman v. Maupin*, 78 Ky. 33; *Wiggins v. Blackshear*, 86 Tex. 665; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97; *Carver G. M. Co. v. Bannon*, 85 Tenn. 712; 4 Am. St. Rep. 803; *Farwell v. Huston*, 151 Ill. 239; 42 Am. St. Rep. 237; *Hapgood v. Cornwell*, 48 Ill. 64; 95 Am. Dec. 516. In other words, if there be any thing in the nature of a lien against the partnership assets pledging them to the payment of its obligations, it is a lien in favor of the partners and of each of them. Therefore, if with the assent of the partners they cease to be such assets, as where one of the partners sells his interest therein to the other, the former has no longer any equitable lien thereon entitling him to insist that such assets be applied to the payment of the partnership indebtedness, and the loss of such lien carries with it the right of the partnership creditors to insist upon such application, and the property is therefore subject to the individual debts of the partner to whom it has been transferred, and also to such liens as he shall create thereafter, and to such transfers as he may choose to make, provided always that he does not act with the purpose of defrauding the partnership creditors: *Norris v. Rumsey*, 54 Mo. App. 143; *City of Maquoketa v. Willey*, 35 Iowa, 323; *Coover's Appeal*, 29 Pa. St. 9; 70 Am. Dec. 149; *Brown v. Miller*, 11 Col. 431; *Schleicher v. Walker*, 28 Fla. 680; *Scudder v. Delashmutt*, 7 Iowa, 39; 71 Am. Dec. 428; *Hanford v. Prouty*, 133 Ill. 339; *Baker's Appeal*, 21 Pa. St. 76; 59 Am. Dec. 752; *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573; *Ladd v. Griswold*, 4 Gilm. 25; 46 Am. Dec. 443; *Bardwell v. Perry*, 19 Vt. 292; 47 Am. Dec. 687. The latter qualification must be made upon the right to transfer the property of the partnership to one of the partners. If the purpose of the transfer is to defraud the creditors of the partnership it will not be permitted to have the intended operation; and, in those states in which a partnership is not allowed to transfer property to individual creditors of one of its members in payment of his debts, if a transfer is made when the firm and all its members are insolvent, and this condition of its affairs is patent to them, such transfer may be adjudged fraudulent as against the partnership creditors: *In re Cook*, 3 Biss. 122; *Arnold v. Hugerman*, 45 N. J. Eq. 186; 14 Am. St. Rep. 712.

A Transfer of the Interest of One Partner to a Third Person does not deprive the other members of the firm of their right to insist that the partnership property be applied to the payment of the partnership debts. Hence the creditors of a partnership have the same right to pursue the property as before the transfer was made: *Brown v. Beecher*, 120 Pa. St. 590; but if, after one partner has sold his interest, the other also sells to the same purchaser, the property ceases to be partnership assets, and cannot be subjected to the payment of partnership debts in the absence of a fraudulent purpose on the part of the vendors and purchaser: *Kimball v. Thompson*, 13 Met. 283.

The Transfer of Interest Resulting from the Death of One of the Partners does not affect the right of the firm creditors to the payment of their claims. The legal title to all of the property of the firm vests upon the death of any member in the survivor or survivors, but it vests in trust for partnership purposes, to wit: the settlement of the affairs of the firm,

the payment of its debts, and thereafter the turning over to the representative of the deceased partner his share of the surplus. Such representative, therefore, has the same right that his decedent had to insist upon the application of the firm property to the discharge of its obligations: *Hoyt v. Sprague*, 103 U. S. 613; and the creditors of the firm continue to have a like right, and an appropriation of the firm property to other than partnership purposes is, as against them, unlawful, and they are entitled to such remedies as may be necessary to prevent it: *Egberts v. Wood*, 3 Paige, 517; 24 Am. Dec. 236; *Emerson v. Senter*, 118 U. S. 3; *Gable v. Williams*, 5 Md. 46; *Watkins v. Fukes*, 5 Heisk. 185; *Moody v. Downs*, 63 N. H. 50; *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573; *Hutchinson v. Smith*, 7 Paige, 26; and to compel the application of the partnership assets to the discharge of its obligations: *Saunders v. Wilder*, 2 Head, 577; *Goldsmith v. Eichold*, 94 Ala. 116; 33 Am. St. Rep. 97; *Silverman v. Chase*, 90 Ill. 37; *Benson v. Ela*, 35 N. H. 402; *Lawrence v. Trustees*, 2 Denio, 577; *Voorhis v. Childs*, 17 N. Y. 354. As the surviving partner has the legal title to the firm personality, and is charged with the duty of closing its business, he may make such disposition of the property as may be necessary to the execution of his trust. He may, it is generally conceded, make an assignment for the benefit of the creditors of the firm. Whether in so doing he may prefer some of those creditors to others is doubtful. As in creating such a preference he is only exercising a power possessed by the partnership, and his act cannot prejudice the representatives of the decedent, there appears to be no reason for denying his power to make such preferences: *Emerson v. Senter*, 118 U. S. 3; *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573. Nevertheless, the majority of the cases upon the subject deny the existence of the power, and regard its attempted exercise as in some way inimical to the trust devolved upon him by the death of his copartner: *Salisbury v. Ellison*, 7 Col. 167; 49 Am. Rep. 347; *Anderson v. Norton*, 15 Lea, 14; 54 Am. Rep. 400; *Hutchinson v. Smith*, 7 Paige, 26. It is beyond question that he has no right to make an assignment which will prefer his individual creditors, or entitle them to any part of the partnership assets: *Gable v. Williams*, 59 Md. 46; *Case v. Abeel*, 1 Paige, 393; *Hutchinson v. Smith*, 7 Paige, 26; *Tiemann v. Molliter*, 71 Mo. 512. The surviving partner may purchase of the representative of the decedent the latter's interest in the partnership assets, and then the question arising is, Do they by this purchase cease to be charged with the partnership liabilities, and acquire the characteristics of the individual property of the purchaser? The only decision we have seen involving this subject declared that such sale had precisely the same effect as if it had been made by the decedent in his lifetime, and therefore destroyed the right of his representatives and of the partnership creditors to insist upon the application of the partnership property to the payment of its debts: *Wilson v. Soper*, 13 B. Mon. 411; 56 Am. Dec. 573. It seems to us that this decision is based upon a misconception of the transaction in question. As the assets of a partnership are always subject to the payment of its obligations, and as the interest of a deceased partner is only his share of what will remain after the settlement of the affairs and the payment of the obligations of the partnership, and as a sale by a personal representative involves no warranty, and is but a sale of the mere interest of the decedent, such a sale would naturally be made by both parties upon the assumption that the property sold was only what might remain after the payment of the firm debts, and it is certainly disappointing the intention of the parties to hold that the property thus sold may be entirely withdrawn from the

creditors of the partnership, and the estate of the decedent thereby left answerable for the whole of the partnership obligations.

The Right of the Creditors of a Partnership to Pursue its Real Property deserves special consideration. At law there is no such a thing as a partnership in real property, and, if the title stands in the names of the partners, it is vested in them as individuals in so far as the legal title is concerned: *Freeman on Cotenancy*, sec. 112; *Coles v. Coles*, 15 Johns. 159; 8 Am. Dec. 231; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305; *Baca v. Ramos*, 10 La. 417; 29 Am. Dec. 463; *Baker v. Wheeler*, 8 Wend. 505; 24 Am. Dec. 66. In equity, however, real property, though held in joint tenancy or by a tenancy in common, so far as the title is involved, will in equity be treated as partnership property under certain circumstances and for certain purposes: *Freeman on Cotenancy and Partition*, sec. 113; *Dirine v. Mitchum*, 4 B. Mon. 483; 41 Am. Dec. 241; *Messer v. Messer*, 59 N. H. 375; *Rust v. Chisolm*, 57 Md. 376. We shall not undertake to inquire in detail what are the tests by which to determine whether real property standing in the name of copartners must be regarded as partnership assets, at least to the extent necessary for the protection of the partners themselves, and of the creditors of the partnership. Of course, the fact that the grantees in the deed happen to be partners does not prove that the property acquired is partnership property, nor is the payment of the purchase price out of the partnership funds conclusive, for the partners may have intended to withdraw those funds from the partnership, and to hold them and the acquisitions made therewith as cotenants, and, if such intent existed, the lands acquired with such funds are not partnership estate: *Wheatley v. Calhoun*, 12 Leigh, 264; 37 Am. Dec. 654; *Holmes v. Self*, 79 Ky. 297; *Collumb v. Read*, 24 N. Y. 513; and perhaps, in the absence of any proof of the intent of the partners, the presumption is that lands acquired by them, even though paid for with partnership funds, are not partnership property: *Freeman on Cotenancy and Partition*, sec. 115; *Wooldridge v. Wilkins*, 3 How. (Miss.) 360; *Cox v. McBurney*, 2 Sand. 561; *Smith v. Jackson*, 2 Edw. Ch. 28. *Contra*, *Collumb v. Read*, 24 N. Y. 513. On the other hand, the fact that payment was made out of the separate funds of the several partners is not conclusive that the real property is not partnership assets, for it may have been purchased under an express or implied agreement that it should be held for the benefit of the firm, and the moneys thus paid by the several partners may be a mutual contribution by them to the partnership capital, in which event, if the property is subsequently held as firm property and devoted to firm uses, it is just as much partnership assets as if paid for out of partnership funds: *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604. If, in addition to being paid for out of partnership funds, lands are purchased by persons who were then partners or who contemplate becoming such, and with an intention to use them in the partnership business, and they are thereafter held and used in and for such business, then beyond question they will be treated as partnership assets so far as may be necessary to the satisfaction of partnership obligations: *Freeman on Cotenancy and Partition*, sec. 117; *Tillinghast v. Champlin*, 4 R. I. 173; 67 Am. Dec. 510; *Lang v. Waring*, 25 Ala. 625; 60 Am. Dec. 533; *Baird v. Baird*, 1 Dev. & B. Eq. 524; 31 Am. Dec. 399; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305. Nor is it essential that the title shall stand in the name of the several partners. It may have been taken in the name of one only to be held by him in trust for the firm and under such circumstances that even in the absence of any

agreement upon the subject such trust is implied, and, in such event, it may, if necessary, be subject to the satisfaction of the partnership obligations: *Shanks v. Klein*, 104 U. S. 18; *Nicoll v. Ogden*, 29 Ill. 323; 81 Am. Dec. 311; *Uhler v. Semple*, 20 N. J. Eq. 288; *Diggs v. Brown*, 78 Va. 295; *Wiegand v. Copeland*, 7 Saw. 442.

Without attempting to further pursue the inquiry, what is partnership realty, we proceed to consider the rights of the creditors of the partnership in such realty as has been impressed with the quality of partnership assets. In proceeding by attachment or execution against such realty the partnership creditors may, of course, levy upon and sell it, and thereby acquire the legal title standing in the name of the partners, or of either of them, at the date of the levy. If, however, they rest upon the levy and sale, and take no proceedings in equity for the protection of their interests, the title acquired by them must remain subject to the claim of dower on the part of the wives of the partners, or of either of them, and to all transfers made or liens created by or against either of the partners. In equity the partnership realty will, in all cases, be treated as partnership assets so far as may be necessary to do complete equity between the partnership and its creditors, and between the several members of the firm. Hence, each of the partners has a lien thereon to secure the payment of any balance which may remain due him upon the final settlement of the partnership affairs: *Roberts v. McCarty*, 9 Ind. 16; 68 Am. Dec. 604; and neither can avoid this lien by compelling the partition of the property: *Baird v. Baird*, 1 Dev. & B. Eq. 524; 31 Am. Dec. 329; *Flunner v. Moore*, 2 Jones, 120. The rule prevailing as to personalty, that even at law neither partner has any specific interest in the firm property, but only a right to share in the surplus after the debts are paid, does not apply with respect to realty. Therefore, if there be a levy upon the interest of a member of the firm in real property belonging to it, and a subsequent levy under a writ against the partnership, and sales thereunder, and the title of the different purchasers thereat is drawn in question in an action of ejectment or other proceeding at law, the writ first levied must be conceded precedence: *Peck v. Fisher*, 7 Cush. 386; *Golden State etc. Works v. Davidson*, 73 Cal. 389. In equity the rule is otherwise. "It is a well-known rule, governing the relation of partnership, that partnership property must first be applied to the payment of partnership debts, and that the true and only interest of each member in the personal stock is the balance found due to him after payment of all the partnership debts, and the adjustment of the partnership accounts between himself and his copartners. And in equity, real estate forms no exception, but stands on the same footing in this respect with personal property, no matter in whom the legal title may be vested": *Bopp v. Fox*, 63 Ill. 540; *Price v. Hicks*, 14 Fla. 565. "Without entering at much length upon an examination of the English and American authorities upon the subject we may say that the doctrine is well established in America that real estate purchased by partners with partnership funds for partnership purposes is at law held by them as tenants in common, but in equity is deemed as held in trust as a part of the partnership property applicable in the first place exclusively to paying the partnership debts": *Duryea v. Burt*, 28 Cal. 580; *Jones v. Parsons*, 25 Cal. 105; *Hoxie v. Carr*, 1 Sum. 173; *Pierce v. Trigg*, 10 Leigh, 406; *Sigourney v. Munn*, 7 Conn. 11; *Dirine v. Mitchum*, 4 B. Mon. 488; 41 Am. Dec. 241; *Pratt v. Oliver*, 3 McLean, 27; *Buffum v. Buffum*, 49 Me. 108; 77 Am. Dec. 249; *Hill v. Beach*, 12 N. J. Eq. 81; *Cilley v. Huse*, 40 N. H. 358; *Gordon v. Kennedy*, 36 Iowa, 167; *Lime Rock Bank v. Phetteplace*, 8 R. L.

56. This rule prevails at law in some of the states. Thus, in New Hampshire, it has been held that an attachment of the firm realty at the suit of firm creditors takes precedence over a prior attachment at the suit of the individual creditors: *Jarvis v. Brooks*, 27 N. H. 37; 59 Am. Dec. 359.

If a widow of a deceased partner applies for an assignment of dower in the lands of the partnership it must be granted to her, unless withholding it is necessary to protect the other partners or the partnership creditors: *Markham v. Merrett*, 7 How. (Miss.) 437; 40 Am. Dec. 76. If, on the other hand, she cannot be assigned such dower without prejudicing the surviving partner, or the partnership creditors, it may, if the proceeding is in equity, be denied her for that reason: *Greene v. Greene*, 1 Ohio, 535; 13 Am. Dec. 642; *Sumner v. Hampson*, 8 Ohio, 328; 32 Am. Dec. 722; *Johns v. Johns*, 1 Ohio St. 357; *Loubat v. Nourse*, 5 Fla. 350; *Bopp v. Fox*, 63 Ill. 540; *Matlock v. Matlock*, 5 Ind. 403; or the surviving partner or the firm creditors may resort to proceedings in equity to have the land sold free of the widow's right of dower: *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Andrews v. Brown*, 21 Ala. 437; 56 Am. Dec. 252. The title to partnership realty, whether it remains in the partners in whose name it was originally taken, or has descended to their heirs at law, or remains partly in the surviving partners and partly in the heirs at law or other successors in interest of a deceased partner, or has been transferred, whether by voluntary or involuntary transfer to some third person having notice that it was partnership property, is held in trust for partnership purposes, and due respect for and execution of that trust may be compelled at the instance of any person whose equities are dependent upon the faithful execution of the trust. The most usual procedure is by bill in equity, against all the persons in whom the legal title is vested, to have the realty in question decreed to be partnership assets, and that through the intervention of a receiver or otherwise it be taken possession of, and so much thereof sold as may prove necessary to satisfy the partnership obligations, including any sum that may be due from the partnership to any of the partners: *Buffum v. Buffum*, 49 Me. 108; 77 Am. Dec. 249; *Murphy v. Abrams*, 50 Ala. 293. If an attachment has been taken out against a member of the firm for his separate debt a suit may be maintained to declare that his lien is subordinate to the claims of the partnership creditors, or of the surviving partner, and he may be restrained from proceeding until the partnership obligations shall first be discharged: *Crooker v. Crooker*, 46 Me. 250; *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 305; *Willis v. Freeman*, 35 Vt. 44; 82 Am. Dec. 619; *Bowen v. Billings*, 13 Neb. 439; *Conroy v. Woods*, 13 Cal. 626; 73 Am. Dec. 605; *Schuster v. Rader*, 13 Col. 329. If the lien has been created by one of the partners, as by giving a mortgage on his interest, and proceedings are instituted in equity for the foreclosure of such lien, the defense may be therein interposed that the property is partnership estate, and the foreclosure of the lien be refused or made subject to the equities of the partnership or of its creditors: *Conant v. Frary*, 49 Ind. 530; *Jones v. Parsons*, 25 Cal. 100.

It is, as we have already indicated, necessary, before subjecting a purchaser or mortgagee from one of the partners, to partnership equities, that he purchased with notice thereof. Whether the notice with which he must be affected must include not only knowledge that the property is partnership assets, but also that it will be needed to satisfy partnership obligations, is perhaps not entirely free from doubt. It would seem that if he purchased or acquired his lien with notice that the property in question was, as between the partners, partnership assets, he should be deemed to

have accepted the title subject to the hazard of its being required to satisfy partnership indebtedness: *Jones v. Parsons*, 25 Cal. 100; *Cavandar v. Bultul*, 29 L. T., N. S., 710; *Tillinghast v. Champlin*, 4 R. L. 173; 67 Am. Dec. 510.

If partnership realty has by any means been sold, and the proceeds brought before the court for distribution, and the court is either a court of chancery or a court which in the matter before it is entitled to be controlled by the principles of courts of equity, as where it is a court having jurisdiction of the estate of insolvents and bankrupts, it will, as in the case of partnership realty, give a preference to partnership creditors: *Fall River W. Co. v. Borden*, 10 Cush. 458.

Form of Relief. It is not necessary to consider in detail the form of relief which may be granted in equity, for it is one of the most beneficial features of equity jurisprudence that it is but little restricted in the form or mode of administering relief, and that, when the existence of an equitable cause of action in favor of the complainant is established, the court is rarely, if ever, when applied to in due time, unable to give him some adequate relief, either preventive or remedial. If a partnership creditor has an equity against its assets which is about to be endangered by a sale of the property by one of its partners, or under an execution or other writ against him, the court may enjoin such sale or disposition, or restrict its operation to the interest which may remain in the partner after the adjustment and settlement of the partnership affairs: *Hubbard v. Curtis*, 8 Iowa, 1; 74 Am. Dec. 283. If, on the other hand, preventive relief is not essential to the complainant, he may, on bringing before the court all the parties in whom the legal title is vested, have a decree for its sale and the application of the proceeds to the discharge of the partnership obligations, and, as incident to the relief granted, may have a receiver appointed, if necessary, either for the preservation or disposition of the property, and such conveyances made as may be required to vest in the purchasers at such sale the legal as well as equitable title to the property sold.

Creditors of the partnership seeking relief of any character in equity are subject to the rules applicable to creditors' bills. In the first place, it is essential to a creditor's bill that the complainant be without adequate remedy at law, and that he show either that he has exhausted his legal remedies or that further pursuit of them must necessarily be unavailing: *Case v. Beauregard*, 1 Woods C. C. 125; 101 U. S. 688; *Smith v. Railroad Co.*, 99 U. S. 398. It is not sufficient that he is a creditor at large, for, as such, he has no lien on the property of the partnership. He must either by attachment, execution, or some other process, have acquired a lien on the property, or he must have recovered judgment at law upon his debt: *Greenwood v. Broadhead*, 8 Barb. 593; *Rice v. Barnard*, 20 Vt. 479; 60 Am. Dec. 54; *Clement v. Foster*, 3 Ired. Eq. 213; *Reese v. Bradford*, 13 Ala. 837; or the equities of his case must be such as to bring him within the exceptions to the general rule upon the subject. As, however, a creditor's bill, to reach either the assets of the partnership or other property which a partnership creditor is entitled to have applied to the satisfaction of his demand, does not as to the *status* required of the complainant differ essentially from other creditors' suits, we forbear to discuss the subject further here, and refer the reader to note to *Massery v. Gorton*, 90 Am. Dec. 288-300; *Quarl v. Abbott*, 102 Ind. 233; 52 Am. Rep. 662, and note; *Freeman on Executions*, secs. 426-430.

RUSSELL v. POLK COUNTY ABSTRACT COMPANY.

[87 IOWA, 233.]

TORT, BREACH OF CONTRACT WHEN MAY AMOUNT TO.—If one person owes another a duty the breach of which is a tort, the fact that the former has expressly contracted with the latter for the performance of such duty does not render its breach any the less a tort, but, if the duty is imposed or created by the contract and otherwise did not exist, its breach is not a tort.

TORT, ACTION FOR, WHAT IS NOT.—The fact that a person negligently performed a duty which he imposed upon himself by contract cannot entitle another contracting party to sustain an action of tort for such negligence, and therefore any action commenced to recover damages for the failure to perform such duty is an action upon a contract, and the statute of limitations applicable thereto is not that designating the time within which actions may be brought for torts, but is that declaring the time within which actions may be prosecuted upon contracts.

STATUTE OF LIMITATIONS.—CAUSE OF ACTION FOR MISTAKE IN AN ABSTRACT WHEN ARISES.—If a searcher of records employed to make a correct abstract of public records affecting the title to real property, through his negligence or mistake omits an instrument from such abstract, a cause of action against him is at once created, and the statute of limitations commences to run in his favor, and cannot be made to commence at a later day by proving that the mistake was not discovered until such later day. That the party for whom it was made, subsequently acting in reliance on its correctness, paid out money which he would not have paid had it been correct, does not constitute any new cause of action.

ACTION to recover damages resulting to plaintiff from an error or mistake in making and certifying to an abstract of title in the month of December, 1884. This abstract showed a certain mortgage to be a first lien on the land described therein. Relying on the abstract the plaintiff purchased the mortgage and subsequently foreclosed it, buying in the property at the sale. A judgment lien had been omitted from the abstract, and therefrom plaintiff suffered damages. The complaint was demurred to on the ground that plaintiff's cause of action was barred by the statute of limitations, and, the demurrer having been sustained, the plaintiff appealed.

Cole, McVey & Cheshire, for the appellant.

W. G. Harvison, for the appellee.

237 GRANGER, J. 1, The statute of limitations commences to run from the time a cause of action accrues: Code, sec. 2529. By section 2530 it is provided that in actions for relief on the ground of fraud or mistake the cause shall not be deemed to have accrued until the fraud or mistake has

been discovered. The petition is without allegations to bring the case within the provisions of the latter section, and hence we are to inquire when the cause of action accrued without reference to its being grounded on fraud or mistake. The pith of the contention by counsel is whether the action is one *ex contractu*, so that the cause of action accrues with the actual breach of the contract, or *ex delicto*, so that the action accrues whenever consequential damages result because of the tort. We are directed especially to the averments of the petition wherein recovery is sought because of negligence in preparing the abstract, and for the money expended in the purchase of the mortgage because of such negligence; and it is said that "no legal damage was sustained on the part of the plaintiff until the purchase of the Kellogg mortgage." We may not correctly apprehend what is meant by the term "legal damage." If it means special damage, such as that alleged, the proposition is correct. If it means general damage, such as the law infers because of the breach, without its being specified, it is not correct. Of course, a cause of action does not accrue in such a case until damages are recoverable, and hence ²²⁸ the statute does not commence to run until there is damage to constitute a basis for an action. The further discussion of the case will indicate our view as to when such damage first arose.

The appellant, in support of its theory, that the action is *ex delicto*, cites the following from Angell on Limitations, section 71: "The action of *assumpsit* lies to recover damages for consequential wrongs or torts, which, though they are *ex delicto*, are *quasi ex contractu*; and they arise from malfeasance, or doing what the defendant ought not to do; nonfeasance, or not doing what he ought to do; and misfeasance, or doing what he ought to do improperly." It also cites the following from Addison on Torts, page 18: "A tort may be dependent upon, or independent of, contract. If a contract imposed a legal duty upon a person the neglect of that duty is a tort founded on contract, so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff." It is then urged that this is "an action for misfeasance," and hence based upon tort. A few considerations will lead to a correct conclusion on this particular proposition, and aid much toward a solution of the entire case. We get the spirit of the rule to be deduced from the above citations,

so far as it pertains to this case, by understanding the last statement in the citation from Addison on Torts: "If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract," and in such a case the injured party may elect to sue for the tort or breach of the legal duty, or sue for the breach of contract. Now, what is the true significance of the rule stated? We think it is this: When the law imposes a duty from one person to another, independent of contract, the duty thus imposed is a legal one, one enjoined by the law. Its neglect is a tort. Now, if the parties by ²³⁹ contract, further impose that duty, which may be, and is often, done then the obligation is twofold—enjoined by both law and the contract—and the author has said no more than that "the neglect of such a duty is a tort founded on contract." It cannot be said that the legal duty referred to means duties arising solely upon contract, for, if it does, then all duties in pursuance of contract are, within the meaning of the rule, legal duties, and hence a neglect to discharge them is a tort. This, followed to its legal conclusion, would make every breach of contract a tort. The duties arising upon contracts are, of course, legal duties, within the most comprehensive meaning of the term, but the sanction of the law making them so is invoked by the contract, and hence in an important and practical sense, we regard and express the obligations and duties thus arising between parties as contractual, and in that way distinguish them from other legal duties or obligations. The learned author was evidently preserving this distinction.

In the case at bar the defendant, independent of the contract, owed no duty to the plaintiff. The neglected duty was one alone enjoined by contract. The failure to perform by the defendant was a failure to discharge its agreement, which is solely a breach of contract. No refinement of reasoning can or should avoid the conclusion. The fact that the act is alleged as negligently done does not change the situation. It is an allegation only as to the manner of making the breach. The liability of the defendant company in no way depends on the fact of negligence. The allegations of the petition show an absolute undertaking "to furnish a full, complete, and correct abstract to the plaintiff, correctly showing the liens of mortgages, judgments, and otherwise." The demurrer admits such an undertaking, and the allegation of negligence cannot have the effect to change the action from one

on contract to ²⁴⁰ one for tort. If A should engage to deliver to B a quantity of wheat at a certain time and place, and he failed to do so, he would be liable upon his undertaking, and, in an action for damage, because of the failure, a mere allegation that he negligently failed to perform would not affect the character of the action. The liability in either case attaches without the negligence. We reach the conclusion that the action is upon contract, and that the statute of limitations is to be applied accordingly.

We may now notice the claims as to when the statute commences to run. With our conclusion as to the character of the action, it is probable the appellant might not claim that the authorities cited are applicable. We refer, however, to a few as indicating the character of all. Reference is made to 2 Greenleaf on Evidence, sections 433 and 434. These sections have reference to cases of tort, and actions on the case sounding in tort, and it is there stated as the rule that in such cases, where the injury is consequential, and the right of action is founded in special damages, the statute commences to run from the time the special damages accrued. Also, where a statute commences to run from the time of the "act done," and the act was lawful as to the plaintiff, the act is regarded as "done" when the damages result. But this case is not within either rule. Section 435 is the one applicable to this case, and it states: "In cases of contract, the general principle is that the statute attaches as soon as the contract is broken, because the plaintiff may then commence his action." As especially applicable to this case, it is further said in the same connection: "And though special damage has resulted, yet the limitation is computed from the time of the breach, and not from the time when the special damage arose."

The appellant cites, as "one of the best-considered cases on this subject," *Bank of Hartford County v. Waterman*, ²⁴¹ 26 Conn. 324. The action is founded on the neglect of an officer to make a valid attachment of real estate, and a false return that he had made such an attachment. That was purely an action *ex delicto*, and neither the neglect to serve the attachment, nor the false return, nor both, under the holding in the case, "would be enough to constitute a cause of action." That case holds to a rule that a failure to serve mesne process, or a false return of such process, is not actionable in itself, but becomes so whenever real injury fol-

lows from it. Such a holding is not in conflict with our views. The case, however, contains some language strongly in their support. It is there said, speaking of the breach of duties to individuals as those created by contract, whereby each party enters into and defines for himself an immediate obligation to the other, that "the breach of such an obligation is a direct and immediate wrong to the other, so that whether any evil consequences follow, or whatever consequences follow, the cause of action dates from the wrong which would be treated as the cause of action, whether the plaintiff sues in tort or contract." The other cases cited by the appellant are, in their legal effect, the same, being actions based upon tort, and not for a breach of contract, with some exceptions, as where money is paid for the benefit of another to discharge his primary obligation, wherein it is held that the cause of action accrues in behalf of the plaintiff when he makes the payment: See *Foster v. Marsh*, 25 Iowa, 300. In *Steel v. Bryant*, 49 Iowa, 116, it is held in an action for negligence by a clerk in accepting an insufficient stay bond, that the cause of action did not accrue until the stay expired. It is there said that the action is "for the negligent performance of a duty imposed." It is then said in the same connection that "the authorities cited in actions based on contract, or *acts of negligence in failing to properly perform obligations resulting from contracts*,²⁴³ are not strictly applicable." The words we have italicized are highly significant in this case, for the negligent act complained of here is one resulting from contract. *Wilcox v. Plummer*, 4 Pet. 172, is a very conclusive case upon the question. The action was to recover damage because of a "blunder" or mistake of an attorney in his professional capacity in the institution and prosecution of a suit on a promissory note. The action (*Wilcox v. Plummer*, 4 Pet. 172) was in form *assumpsit*. The damages sought to be recovered were those resulting from the mistake, the result of the mistake being that the note became barred by the statute of limitations because of a nonsuit occasioned thereby. The question in the case was whether the statute commenced to run "from the happening of the damage," or at the time the mistake was made. The language of the opinion reaches several phases of this case. It is there said: "The ground of the action here is a contract to act diligently and skillfully, and both the contract and breach of it admit of a definite assignment of date.

When might this action have been instituted is the question, for from that time the statute must run." These facts and the query have an exact parallel in the case at bar, and this case should be controlled by the conclusion in that. The court announced its conclusion as follows: "When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that extent, no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of the action." It is held that the statute commenced to run at the time of the mistake.

We do not forget that it is averred in the petition ²⁴³ that the defect in the abstract was not known until the damage alleged had been sustained; but that fact does not arrest the running of the statute. It is said in *Bank of Hartford County v. Waterman*, 26 Conn. 324, that "ignorance of his rights on the part of a person against whom the statute had begun to run will not suspend its operation. He may discover his injury too late to take advantage of his appropriate remedy." Again, it would seem that our statute makes a plea of fraud or mistake necessary to change the time when the cause of action accrues: Code, sec. 2530. *Crawford v. Gaulden*, 33 Ga. 173, is also a case grounded upon the neglect and unskillful act of an attorney in the management of a cause, and to avoid the operation of the statute of limitations the plaintiff alleged that the negligent and unskillful acts were unknown to him when done, and not known till about 1853, and the limitation period was four years from the time the cause of action accrued. The opinion upon that particular branch of the case contains this language: "The doctrine is well settled that, in an action against an agent for negligence and unskillfulness, the statute of limitations commences to run from the time the negligent or unskillful act was committed, and plaintiff's ignorance of the negligence or unskillfulness cannot affect the bar of the statute." Authorities are cited in support of the rule, and see, also, *Mardis v. Shackelford*, 4 Ala. 493; *Governor v. Gordon*, 15 Ala. 72; *Ellis v. Kelso*, 18 B. Mon. 296; *Bank of Utica v. Childs*, 6 Cow. 238; *Sinclair v. Bank of S. C.*, 2 Strob. 344. In this case, when the ab-

abstract was delivered with the alleged defect, there was a breach of the contract to prepare a perfect one, and at least nominal damages were recoverable, and we think it safe to say that the expenses of its procurement were within the rule of general damages. Thereafter, for five years, the right of action continued, during which time the door of inquiry was open to ²⁴⁴ know the facts, and we think there is no rule of public policy requiring us to extend the time by a construction of the statute that to us seems to be against the current of authority.

2. It is next urged that the action is not barred, because the contract is a continuing one. In support of the proposition several cases are cited. Comment on one of them will be sufficient, as it will be applicable to all. *McCay v. McDowell*, 80 Iowa, 146, is based on a breach of contract for support, the contract being for the support of the plaintiff during his natural life. The contract was made in March, 1878, and there was a breach in October, 1878. Under a claim that the action was barred by the statute, it having been commenced more than five years after the breach, the contract was held to be a continuing one, on the authority of *Riddle v. Beattie*, 77 Iowa, 169. Those cases are unlike this. In those cases an obligation or duty continued from day to day and year to year. The defendants were every day and year required to act in the fulfillment of the contract. It is not a case of new damages arising because of a breach long since made, but a case of a continuing breach of failure of duty, from which new damages arise, and the actions were permitted for breaches committed within the period of limitation, and not for damages happening within the period, as a result of a breach committed beyond it. In this case the duties of the defendant company ceased with the delivery of the abstract. It owed no further obligation to the defendant. As is said in *Wilcox v. Plummer*, 4 Pet. 172: "Both the contract and the breach admit of a definite assignment of date." After the delivery of the abstract the contract was executed, and the breach complete. There has been no additional breach since; only new damages for the old breach.

²⁴⁵ 3. The appellant insists that this action can be maintained under the code, section 2524, as follows: "Successive actions may be maintained upon the contract or transaction whenever, after the former action, a new cause of action has arisen therefrom." If the section could be held applicable to

a case like this, there is nothing in the language to indicate an intent to permit such actions beyond the period of limitation. . However, the solution may be put upon another ground. This statute was applied in *McCay v. McDowell*, 80 Iowa, 146, and it is to such continuing contracts that it applies. The statute has no application to additional damages happening or discovered because of some particular breach of a contract. It is applied when there is a continued or repeated breach by way of acts or neglect. *Richmond v. Dubuque etc. Ry. Co.*, 33 Iowa, 422, is of this latter class.

The fourth proposition discussed by the appellant is as to the strict accountability to which abstractors are held by the law, and we need not discuss it. The reasoning is strong, and, barring the application to this case, it accords with our view of the law. That strict accountability, we think, must be required in a case of this kind, within the period that the law fixes for actions upon unwritten contracts, where neither fraud nor mistake is the ground for relief.

The judgment of the district court is in harmony with our view, and it is affirmed.

LIMITATIONS OF ACTIONS IN CASES OF NEGLIGENCE OR TORT.—The statute of limitations begins to run against an action for misconduct or negligence from the date when the act of misconduct or negligence is completed, and it is immaterial whether the negligence out of which the cause of action arises is the breach of an implied contract or the affirmative disregard of some positive duty: *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 115, and note.

LIMITATIONS OF ACTIONS IN CASES OF MISTAKE: See the note to *Lattin v. Gillette*, 95 Cal. 317; 29 Am. St. Rep. 120.

ANDREGG v. BRUNSKILL.

[87 IOWA, 351.]

CHATTEL MORTGAGES.—A DESCRIPTION IN A CHATTEL MORTGAGE IS SUFFICIENT if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property.

CHATTEL MORTGAGES.—THE DESCRIPTION IN A CHATTEL MORTGAGE referring to the ownership or location of the property mortgaged is of great importance, and the omission of these data may leave imperfect and void a description, which, were they present, might properly be sustained.

CHATTEL MORTGAGE.—A DESCRIPTION OF PROPERTY MORTGAGED as "fourteen steers one year old, crop off left ear, and slit in the same ear; four heifers one year old, marked on ear as above steers," without any reference or statement respecting the location or ownership of the property, is insufficient and void.

Ira T. Martin, for the appellants.

Argo, McDuffie & Reichmann, for the appellee.

352 GRANGER, J. 1. John Beyer made to the plaintiff a mortgage on certain personal property. He afterward sold the property to the defendants, and this action is for the value thereof, because of a wrongful conversion. The plaintiff at the trial offered in evidence the mortgage, and an objection, which was overruled, presents the question of the sufficiency of the description in the mortgage to impart constructive notice. The description is in these words: "Fourteen steers one year old, crop off left ear, and slit in same ear; four heifers one year old, marked on ear as above steers." It has long been the settled rule of this state, in chattel mortgage descriptions, that they will be sufficient if they will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property. This rule is announced in *Smith v. McLean*, 24 Iowa, 322, and it has been many times repeated. Many mortgage descriptions have been subjected to the test of this rule, and their validity thereby determined. It will be noticed that the description quoted is not aided by any statement as to the location or ownership of the property when the mortgage was executed. The importance of such statements to aid what may be 353 called doubtful descriptions have been noticed by this court, and we will refer briefly to some of them.

In *Rhutzel v. Stephens*, 68 Iowa, 627, "all my stock hogs, being forty, more or less, with the pigs now with them," is held sufficient. The balance of the description in the same mortgage is held insufficient, being, in part: "One span of colts, three years old; one gray, one bay." This is certainly as definite a description as the other, except that it does not appear to whom they belonged. The same may be said of the following in the same mortgage: "One brindle cow six years old, and one cow four years old, with calf with her, blind in one eye. One roan cow six years old." It is said in the opinion, speaking of the mortgage description, and holding that it did not describe the property in such manner as to enable third parties, by inquiring, to identify it, that "it makes no reference to the ownership of the property, nor does it refer to its location."

In *Wells v. Wilcox*, 68 Iowa, 708, the description was general, as horses, buggies, etc., and the possession was stated

in the mortgagor. The description was held sufficient, the court saying: "It plainly shows that the property was, when the mortgage was executed, in the possession of the mortgagor, in Hardin county." In the same case, speaking of cases in which descriptions have been held insufficient, it is said they "failed to direct inquiry for the identification of the property, by omitting to show in whom the possession of the property was when the mortgage was executed, or gave no means of identification, further than the bare statement of the species of the property, or its kind, with marks that would well apply to other property." The marks described in the mortgage in this case could well apply to other cattle of the same age, and, as showing the fact, it may be said that the mortgagor had many other cattle with the same mark, and they were being sold ³⁵⁴ from time to time, and the mortgage would not so aid an inquiry as to enable a third party to distinguish the cattle in question from others. If the mortgage indicated their location or ownership at a particular time the advantages in the way of inquiry would be readily seen.

In *Warner v. Wilson*, 73 Iowa, 719, 5 Am. St. Rep. 710, the cattle were separately described by color, age, and name; and this court held the description insufficient, because of "no statement as to the present or past ownership of the property, nor of the place where it is now or has been kept."

It is hardly necessary to pursue the thought further. Any yearling steers or heifers with a crop and slit in the left ear, no matter how, when, or where made, would come within the description of this mortgage, and no matter where they were, or who was the owner. We have held that no presumption of ownership arises from the execution of the mortgage: *Everett v. Brown*, 64 Iowa, 420; *Warner v. Wilson*, 73 Iowa, 719; 5 Am. St. Rep. 710. We regard the description in the mortgage as insufficient.

2. It is said by the appellee that the question of the sufficiency of the description is one for the jury, and reference is made to *Peterson v. Foli*, 67 Iowa, 402. The point of that case is misapprehended. Where the description in the mortgage is sufficient to authorize it in evidence the question of the identity of the property claimed with that described in the mortgage is a question for the jury. The question of the sufficiency of the description in a mortgage, to render it competent evidence, is for the court.

3. It is urged that by a demurrer to the petition the question of the sufficiency of the description was determined adversely to the defendants, after which they answered, and thereby waived the objection. ³⁵⁵ Neither the original nor the amended abstract shows that a demurrer was interposed to the petition, and hence we cannot consider the point.

With our holding that the mortgage is invalid as to third parties it is not necessary to consider other questions presented. Reversed.

CHATTEL MORTGAGES—SUFFICIENCY OF DESCRIPTION.—The description in a chattel mortgage is sufficient, as a general rule, when it will enable a third party, aided by inquiries which the mortgage itself suggests, to identify the property: *Buck v. Davenport Sav. Bank*, 29 Neb. 407; 26 Am. St. Rep. 392, and note. This subject is fully discussed in the extended note to *Barrett v. Fisch*, 14 Am. St. Rep. 239-247.

METCALF v. KINCAID.

[87 IOWA, 443.]

ASSIGNMENT OF WAGES—WHAT SUFFICIENT.—A letter or order directed to the auditor of a railway corporation requesting him to pay to a person named therein the salary of the writer during the ensuing six months, accepted and partly acted upon by the corporation, is a sufficient assignment of such wages, if they thereafter accrue. All that is necessary to accomplish an assignment is that the intent to assign appear from the writing or otherwise. The form is of little moment.

GARNISHMENT.—AN ASSIGNMENT OF A DEMAND IS GOOD, and sufficient as against a subsequent garnishment, if such assignment was binding upon the assignor.

AN ASSIGNMENT OF FUTURE EARNINGS is sufficient to vest them in the assignee as against attaching creditors, though there was no contract of employment for any definite length of time, if the assignor was actually at work at the time, under an engagement then existing at a fixed price, under which he might reasonably expect to earn wages in the future.

Wright & Baldwin, for the appellant.

Wheeler & West, for the appellee.

⁴⁴⁴ **KINNE, J.** The plaintiff, on December 31, 1889, brought his action against the defendant, Kincaid, before a justice of the peace, in which action a writ of attachment was issued, under which the railway company was garnished. Notice of garnishment was served on the company December 31, 1889. Thereafter the company answered that prior to the garnish-

ment, and on October 29, 1889, it accepted the following assignment:

“ OMAHA, October 29, 1889.

“ *Mr. E. Young, Auditor,*

“ DEAR SIR: Please pay to Mr. J. J. Burns, Denver, Colorado, my salary as foreman oil-house at Omaha, during the months of October, November, and December, 1889, and January, February, March, and April, 1890, account of my indebtedness to Mr. Burns in the sum of five hundred dollars (\$500.00).

“ Yours, truly,

“ J. W. KINCAID.”

That Burns claimed and owned all the wages earned by Kincaid as employee of said company according to the tenor of said assignment; that ever since its date the garnishee had paid the wages earned for the months stated in said order to Burns, and on January 3, 1890, paid Burns, under said order, the wages earned by Kincaid. The justice entered judgment against the garnishee on its answers for fifty-eight dollars and fifty-five cents. The garnishee sued out a writ of error to the superior court of the city of ⁴⁴⁵ Council Bluffs, and the superior court affirmed the finding of the justice.

At the proper time the garnishee caused a certificate to be executed and filed by the judge of said court certifying certain questions of law to this court for its determination. We need not set out the certificate. Objection is made thereto, but we think it sufficiently indicates the questions presented for our consideration. They involve: 1. The right of a person in the employ of another to assign future earnings, in the absence of a contract under which the wages are to be earned, so as to vest in the assignee all the right, title, and interest of the assignee to the same; 2. Whether, in case an existing contract is necessary to the validity of the assignment, there is any presumption that the defendant was working under such a contract, or must the contract be pleaded and proved? 3. Does the instrument set out in law amount to an assignment, so as to vest in Burns the wages earned by Kincaid, to the exclusion of the attaching creditors?

1. The last question is first argued by counsel. It is insisted by the plaintiff that, as the order was addressed to “E. Young, Auditor,” it would not bind the railway company, and that an acceptance of it by the garnishee would not, at least as against the plaintiff, bind the company. True, the order is not directed to the railway company, nor,

on its face, to Young as an official of the company; but it has often been held that no particular form of words need be used to constitute an assignment of a debt. All that is necessary is that the intent to effectuate an assignment shall clearly appear. That intent may appear from the writing itself, or it may be shown otherwise: *Moore v. Lowrey*, 25 Iowa, 338; 95 Am. Dec. 790; *McWilliams v. Webb*, 32 Iowa, 577; 1 Am. & Eng. Ency. of Law, 834; Drake on Attachments, sec. 526. As has been ⁴⁴⁶ said: "When the appropriation of the property is made by the assignor and accepted by the assignee the particular form in which the thing is done is of little moment, and the assignment will be sustained": Drake on Attachments, sec. 526. Now, it is clear from the assignment itself, and from the further fact that it has been accepted and in part acted upon, and the assignee has received in part the benefits sought to be conferred by the assignment, that the intention was to assign certain future earnings of Kincaid, which were to accrue from the railroad company to Burns. That all the parties so understood it is apparent from the fact that all of them have treated the order as directed in fact to the railroad company through its proper official. The fact that the order is informally drawn is of no importance, in view of the effect given it by the parties and their manifest intent. The law is well settled that the plaintiff can occupy no better position with respect to the fund in controversy than could the defendant. Could the defendant, after signing such an order, and after its acceptance by the real party to whom he intended to direct it, successfully maintain an action against the company who had acted upon it, and paid out money on the faith of it? Surely not. The garnishee cannot, because of his garnishment, be placed in any more favorable or unfavorable position than he would be in if the defendant was seeking to enforce his claim: *Smith v. Clarke*, 9 Iowa, 241; *Fifield v. Wood*, 9 Iowa, 249; *Huntington v. Risdon*, 43 Iowa, 517; *Victor v. Hartford F. Ins. Co.*, 33 Iowa, 210; *Cox v. Russell*, 44 Iowa, 556. Even a bill which has been accepted is good against the acceptor though there was no drawee named therein: Daniel on Negotiable Instruments, sec. 97. If, then, Kincaid's wages were in law assignable—a question hereafter considered—the order, having been intended to assign them to Burns, and ⁴⁴⁷ having been accepted and acted upon, is, though informal, effectual as an assignment.

2. The first question certified, in substance, is whether one can assign his future earnings so as to vest the same in his assignee, free from the claims of attaching creditors; and, if so, can a valid assignment be made of wages in the absence of a contract under which the wages are to be earned? A great many cases have been decided touching this question. We shall refer to a few of them to show that the conclusion we have reached finds abundant support.

It has been held that a schoolteacher who was indebted to another had the legal right to make an assignment of his wages to accrue under his contract with the district, and when he drew an order on the district treasurer in favor of his creditor, which was accepted by the proper officers of the district, conditioned on his completing his contract, and the creditor authorized the district secretary to draw the money for him, which he did before he was garnished, that the fund was not subject to garnishment by creditors of the teacher: *Johnson v. Pace*, 73 Ill. 143; *Ruple v. Bindley*, 91 Pa. St. 296. So it has often been held that when one assigns wages to be earned under an engagement then existing, and when he was actually at work thereunder, at a fixed price, payable at a certain time, though no contract of employment existed for any stipulated time, yet such an assignment, if accepted, would be good as against a garnishment by creditors of the assignor: *Taylor v. Lynch*, 5 Gray, 49; *Lannan v. Smith*, 7 Gray, 150; *Hartley v. Tapley*, 2 Gray, 566; *Weed v. Jewett*, 2 Met. 608; 37 Am. Dec. 115; *Brackett v. Blake*, 7 Met. 335; 41 Am. Dec. 442; *Emery v. Lawrence*, 8 Cush. 152; *Thayer v. Kelley*, 28 Vt. 19; 65 Am. Dec. 220; *Augur v. New York etc. Packing Co.*, 39 Conn. 536; *Garland v. Harrington*, 51 N. H. 409; *Wallace v. Heywood Chair Co.*, 16 Gray, 209; 3 Pomeroy's Equity Jurisprudence, sec. 1286; Drake on Attachments, sec. 612; 1 Am. & Eng. Ency. ⁴⁴⁸ of Law, 828. And it has been held that such an assignment is good in the absence of an express contract fixing a time of employment, as where the assignor, when he executed the assignment, was employed at piece work or by the day: *Lannan v. Smith*, 7 Gray, 150; *Kane v. Clough*, 36 Mich. 436; 24 Am. Rep. 599.

It is equally well settled that an assignment of wages expected to be earned in the future, and not based upon an existing contract, engagement, or employment, is void: *Mulhall v. Quinn*, 1 Gray, 105; 61 Am. Dec. 414; *Jermyn v. Moffitt*, 75 Pa. St. 402; *Ruple v. Bindley*, 91 Pa. St. 296; *Morrill v.*

Noyes, 56 Me. 458; 96 Am. Dec. 486; *Runnells v. Bosquet*, 60 N. H. 38; *Lehigh Valley R. R. Co. v. Woodring*, 116 Pa. St. 513. The distinction between the two classes of cases is this: In the one an attempt is made to assign something which exists in expectancy only. In such a case it is apparent that there is nothing to assign. The expectancy may never become a reality. The earning of wages or the accumulation of property in such a case will depend on the ability of the assignor to procure employment in the future. There is no present employment which may reasonably be expected to result in the earning of wages. In the other class of cases one has entered into a contract or upon an employment whereby, in the ordinary course of events, wages will be earned, or property acquired as the direct result of the contract, employment, or engagement. The true rule is that an assignment of wages to be earned is good if accepted, and if, at the time it is made, there is an existing engagement or employment by virtue of which wages are being, and in future may reasonably be expected to be, earned, even though there is no contract or fixed time of employment. And in the case of a contract for work or labor an assignment of the fruits of it may be good, though the labor to be performed under it has not yet been commenced.

449 The first and third questions, then, must be answered in the affirmative; and, as we hold that the existence of a contract is not necessary if the assignment is based on wages to be earned in an existing employment, we need not consider the second question.

Reversed.

ASSIGNMENT OF FUTURE EARNINGS—VALIDITY OF.—Equity will uphold an assignment of wages expected to be earned in the future but not under an existing employment or contract. *Edwards v. Peterson*, 80 Me. 367; 6 Am. St. Rep. 207. See, also, the notes to the following cases: *Harris County v. Campbell*, 2 Am. St. Rep. 473; *Field v. Mayor*, 57 Am. Dec. 440; *Brackett v. Blake*, 41 Am. Dec. 443; *Mulhall v. Quinn*, 61 Am. Dec. 417; *Skipper v. Stokes*, 94 Am. Dec. 650; and *Munly v. Bitzer*, 34 Am. St. Rep. 245.

ASSIGNMENT OF FUTURE EARNINGS—VALIDITY AS AGAINST ATTACHING CREDITOR.—An assignment of a debt to become due on the completion of a job of work, or at the expiration of a term of service is valid, and a garnishment thereafter made is ineffectual: *Payne v. Mayor*, 4 Ala. 333; 37 Am. Dec. 744. A debtor may assign his future earnings to one creditor, and if the employer agrees to pay the assignee he cannot afterward be charged as the trustee of the assignor, in a process sued out by another creditor: *Weed v. Jewett*, 2 Met. 608; 37 Am. Dec. 115, and note. The transferee for value of wages to be earned in the future under an existing contract, for

the rendition of services during a specified period, is invested with an equity which prevails over that of a creditor who afterward seeks to attach the same wages: *Manly v. Bitzer*, 91 Ky. 596; 34 Am. St. Rep. 242, and note; but an assignment of wages to be earned under an existing contract is void if made for the purpose of preventing their being attached under trustee process, notwithstanding the fact that the assignment was openly made and for a good consideration: *Gragg v. Martin*, 12 Allen, 493; 90 Am. Dec. 164.

LYON v. CALLOPY.

[87 IOWA, 567.]

EXEMPTION.—WAGES EARNED IN ANOTHER STATE, by the laws of which they are exempt from execution, are nevertheless subject to garnishment in this state. The exemption laws of another state cannot be pleaded or relied on as a defense by either the garnishee or the judgment debtor.

THE Chicago, Milwaukee & St. Paul Railway Company was garnished in Iowa under an attachment issued in that state against one Callopy. The indebtedness of the defendant was admitted, but was claimed to be exempt from attachment because it consisted of wages due to him for services performed in Wisconsin, by the laws of which state they were exempt from execution and attachment. The judgment was against the garnishee, and it and the defendant appealed.

O. J. Taylor and W. H. Farnsworth, for the appellants.

George T. Webster, for the appellees.

568 ROTHROCK, J. The facts upon which the appellants rely for a reversal of the judgment are as follows: The defendant Callopy is the head of a family, and resides in the state of Wisconsin, and was employed by the garnishee railway company, and labored for it in that state; and the garnishee, at the time it was garnished, was indebted to Callopy in the sum of one hundred and six dollars. It is claimed that, under the laws of Wisconsin, the wages due him are exempt from the payment of his debts, and that he is entitled to claim that exemption in this state. Every question in this case was determined against the appellants in the case of *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, and in *Broadstreet v. Clark*, 65 Iowa 670. It is said in the last-named case that "we regard it as the settled rule in this state that the exemption laws of another state or territory cannot be

pleaded or relied on as a defense by either the garnishee or judgment debtor."

If we understand counsel for the appellants, they practically concede that the case of *Mooney v. Union Pac. Ry. Co.*, 60 Iowa, 346, stands squarely in the way of a reversal of this case; but they seem to think that the attention of the court was not called in that case to the proposition that the debt was exempt by the laws of Nebraska. This is a mistake, and the opinion in the case so shows. It is useless to cite cases which hold that by some sort of comity the exemptions allowed to residents of this state should be extended to residents of sister states. Exemption laws are purely statutory, and our code, section 3072, expressly provides that "if the debtor is a resident of this state, and is the head of a family," he may hold certain property and debts as exempt. This provision as plainly requires ⁵⁶⁹ that there must be residence in this state as that the debtor must be the head of a family.

There is no other question in this case which demands consideration, and the judgment of the district court is affirmed.

ATTACHMENT.—GARNISHMENT OF WAGES EXEMPT IN ANOTHER STATE: See the note to *Singer Mfg. Co. v. Fleming*, 42 Am. St. Rep. 623, where the cases are collected.

STATE v. VAN BEEK.

[87 IOWA, 569.]

JURISDICTION—PRACTICE.—A COURT WILL RECOGNIZE WANT OF JURISDICTION even if no objection is made, for, if the court is without jurisdiction, it is powerless to act in the case.

EQUITY JURISDICTION.—THE TITLE TO AN OFFICE cannot be tried in equity.

PUBLIC OFFICE.—THE TITLE TO A PUBLIC OFFICE may be tried in proceedings against a person claiming to be entitled to such office, though he has not yet taken possession of it, if the statute declares that, when several persons claim to be entitled to the same office or franchise, a petition may be filed against all, or any portion of them, in order to try their respective rights thereto.

PUBLIC OFFICE.—AN ALIEN IS NOT ENTITLED to hold a public office, though there is no constitutional or statutory provision expressly excluding him from such right.

PUBLIC OFFICE.—AN ALIEN ELECTED TO A PUBLIC OFFICE is, on subsequently, and before the time when he is required to qualify for the office, becoming a naturalized citizen, entitled to hold such office and discharge the duties thereof, if there is no constitutional or statutory

provision expressly requiring him to be qualified therefor at the time of his election.

PUBLIC OFFICE.—THE RIGHT TO A PUBLIC OFFICE IS NOT FORFEITED by the failure to qualify at the time designated in the statute, if such qualification was prevented by an injunction or other proceeding by which the right or power to qualify was temporarily suspended.

M. A. McCoid, Palmer & McCoid, and Phillips & Day, for the appellants.

T. A. Bereman, W. T. Withrow, and R. Ambler & Son, for the appellees.

⁵⁷² GIVEN, J. 1. The first question presented is that of jurisdiction. The appellees contend that neither the district court nor this court has jurisdiction to hear and determine the cause as presented in the pleadings. A determination of this question requires that we state at some length the allegations of the plaintiff's bill. On January 4, 1892, that being the first Monday in said month, the plaintiff filed a bill, stating that the relator, Gillis, was a resident citizen and elector of the county; that he voted at the general election in 1891 ⁵⁷³ for the relator Perine, and is interested in the result of this suit; that the county attorney was asked to bring this action, and failed and refused to do so, whereupon it is brought by a private individual. The petition alleges, in substance, as follows: That the relator Perine had held the office of sheriff of Henry county for the preceding two years and was then in possession thereof, and entitled to hold the same until a successor "legally eligible" was duly elected and qualified; that he and the appellee Van Beek were opposing candidates for said office at the general election in 1891; that Van Beek received a majority of all the votes cast; that a certificate of election had been issued to him, and that he was about to present his bond to the defendant board for approval, and to qualify as such sheriff, and demand said office of the relator Perine; that said George Van Beek was not a citizen of the state or of the United States, for the reason that he was born in the kingdom of Holland, and had never been naturalized under the laws of the United States, and was therefore "not eligible to the office at the time of his election"; that he fraudulently concealed said facts, and represented himself to be a citizen of the United States, and an elector of this state at the time of the election, of the canvass of the vote, the issuing of the certificate, and until after the expiration of the time for con-

test; that the relator Perine received the highest number of votes cast for any candidate eligible to hold said office, but the board of canvassers, not knowing that said Van Beek was ineligible, declared him elected. The prayer is that the right to said office be determined; that Jacob Perine be adjudged legally in possession of the same, and entitled to hold the same until his successor is elected and qualified; that George Van Beek be adjudged ineligible thereto; that the action declaring his election be canceled and declared void, and that Jacob Perine be declared elected, and entitled to qualify ⁵⁷⁴ and to exercise said office after qualification; that the board of supervisors be commanded to issue a certificate of election to the relator Perine, and that the said board and the auditor be commanded to qualify and swear him in as such officer; that temporary injunction issue restraining the chairman of said board and said auditor from proceeding to qualify said Van Beek, and restraining Van Beek from qualifying and from further claiming said office until this cause is determined.

On presentation of said petition to Hon. W. I. Babb, judge, in chambers, he ordered that a temporary writ of injunction issue restraining Van Beek from exercising any of the duties and functions of said office "until information in *quo warranto* can be heard, upon the relators James R. Gillis and Jacob Perine filing a bond conditioned as by law." Bond being filed, the clerk, on said fourth day of January, issued a temporary writ of injunction in accordance with said order. On the same day the defendants appeared, and filed a motion to dissolve the injunction on the ground that the same was issued without authority of law, which motion was then submitted and overruled, and the court ordered the cause set down for hearing on the next day at 9 o'clock A. M. By this motion the defendants questioned the jurisdiction of the court. The overruling of the motion was favorable to the appellant, and, as the defendants have not appealed, he insists that the question of jurisdiction is not before this court. This court has uniformly held that it will recognize want of jurisdiction, even if no objection be made: *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa, 380; *Groves v. Richmond*, 53 Iowa, 570. Whenever a want of jurisdiction is suggested, by our own examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case.

⁵⁷⁵ 2. The appellee contends, and correctly so, that an action in equity aided by injunction will not lie to try title to an office: *Cochran v. McCleary*, 22 Iowa, 75; *District Township v. Barrett*, 47 Iowa, 110; *State v. Simpkins*, 77 Iowa, 676. The appellee also contends that the only action authorized by chapter 6, title 20, of the code, so far as it relates to public offices, is against one holding or exercising such office, and that, as he is not holding or exercising the office in question, no action will lie against him under said chapter. He maintains that this is an action to prevent him from taking and exercising the office, and that no such action is provided for by statute or common law, and therefore the court is without jurisdiction. Said chapter 6, in addition to the actions against persons doing the things specified in the first section, provides, in section 3352, as follows: "When several persons claim to be entitled to the same office or franchise a petition may be filed against all or any portion thereof, in order to try their respective rights thereto, in the manner provided by this chapter." Herein the right to proceed against one claiming to be entitled to an office or franchise is clearly given. Here we have two persons claiming to be entitled to the same office, and by this section authority is given to try their respective rights thereto. We are in no doubt but that the court has jurisdiction over this cause.

3. On the fifth day of January, 1892, the defendant filed a demurrer to the petition. He also filed a motion for permission to be naturalized, stating that he was born in Holland in 1834, emigrated with his parents to the United States in 1847, and has resided therein ever since, and for twenty-seven years in Henry county; that in 1861 he volunteered in the United States military service in the war of the rebellion, ⁵⁷⁶ and was honorably discharged therefrom in 1866. The record shows that, upon proof being presented, he was duly naturalized on said fifth day of January, and that said demurrer was overruled. On the sixth day of January the defendant Van Beek answered, admitting that votes were cast at the general election as alleged, that he is a native of Holland, and that he was at the time of the election unnaturalized. He alleged that his father was naturalized in 1855; that he had been advised that his father had been naturalized before he (the defendant) attained his majority, and never until the commencement of this proceeding had reason to doubt that he was a citizen of the United States;

and that, relying thereon, he had exercised the rights of a citizen since arriving of age. He then set out his service in the army, his naturalization on January 5th, and alleged that immediately thereafter he filed his bond as sheriff, which was approved, and took the oath of office required by law. He denies all fraud, and prays that the injunction issued be dissolved, that he be declared to be the duly elected and qualified sheriff, and that the immediate possession and control of said office be granted to him. Plaintiff moves to strike out that part of the answer stating that the defendant relied upon information that his father was naturalized before the defendant became of age, that he exercised the rights of citizenship, and that he served in the army and was naturalized. This motion was properly overruled, as the matters set out were competent and material in denial of the fraud charged by the plaintiff.

4. On January 6, 1892, the plaintiff filed a demurrer to the answer, as follows: "1. That said answer on its face admits the fact that defendant George Van Beek was, at the time of his election, not a citizen of the United States and of the state of Iowa, and was so ineligible to said office.

577 "2. The answer admits on its face that defendant George Van Beek was not a citizen of the United States and of the state of Iowa at the commencement of the term of office of sheriff of Henry county, under the statutes of the state of Iowa, and was ineligible to hold the office at that time.

"3. It shows that, not being eligible at the time of the election, and at the time of the commencement of the term of office, the office became vacant, and that the present incumbent (in office), by statutory appointment, holds over until a successor legally eligible to said office shall be elected and qualified.

"4. Because no subsequent act can be retroactive, and so operate as to make defendant eligible at the date required by law.

"5. The answer confesses all substantial allegations and equities of the petition, and shows defendant not entitled to the office claimed by him."

This demurrer was overruled on the same day, to which the plaintiff excepted. The answer admits that the appellee Van Beek was an alien at the time of his election, and that he remained such until January 5, 1892, when, as it is

alleged, he was legally naturalized, and became a citizen of the United States and a qualified elector of Henry county. The question is whether these allegations, taken as true, show Mr. Van Beek qualified to hold the office of sheriff.

Our first inquiry is, whether an alien can hold the office of sheriff under the laws of Iowa. There is no provision in our constitution or statute upon that subject, yet it is certainly a fundamental principle of our government that none but qualified electors can hold an elective office unless otherwise specially provided. This precise question was passed upon in *State v. Smith*, 14 Wis. 497. Smith, an alien, who had been elected, was holding the office of sheriff without being naturalized. In speaking of our form of government the court ⁵⁷⁸ says: "As to all such governments it is an acknowledged principle which lies at the very foundation, and the enforcement of which needs neither aid of statutory nor constitutional enactments or restrictions, that the government is instituted by the citizens for their liberty and protection, and that it is to be administered, and its powers and functions exercised, only by them and through their agents." After reasoning with marked ability upon the question the court said in conclusion: "We entertain no doubt, upon the facts stated in the complaint, that the defendant was ineligible." We are of the opinion that appellee Van Beek was ineligible to hold the office of sheriff prior to his naturalization.

This brings us to inquire whether the fact alleged of the appellee's having become eligible on the fifth day of January, 1892, entitled him to take and hold the office; in other words, whether his ineligibility relates to the time of his election, or the time he was required to qualify. In considering this question it must be remembered that we have no provision declaring who are or who are not eligible for election to or to hold the office of sheriff, and that it is only upon the general principles already stated that the appellee is held to have been ineligible to hold that office before he was naturalized. This case must not be confounded with those resting upon expressed provisions as to eligibility, either for election to or for holding any particular office. Such cases are determined by the language of the provision, while this case must be determined by the fact that the disability was one that could be, and according to the allegation was, removed in time to qualify. Mr. Cushing, in his Law and

Practice of Legislative Assemblies, section 78, in speaking of the time to which disqualifications relate, says: "Thus, where it is said that no person holding a particular office, etc., 'shall have a seat,' 'shall be a member,' ⁵⁷⁹ 'shall at the same time have a seat,' 'shall hold a seat,' 'shall be capable of having a seat,' 'shall be capable of being a member,' 'shall be capable of holding any office,' 'shall act as a member'—the disqualification relates to the time of assuming the functions of a member; but where the following terms are used, namely, 'shall be incapable of being elected' 'shall be eligible to a seat,' 'shall be eligible as a candidate for,' 'shall be ineligible'—the disqualification relates to the time of the election." If the appellee's disability was removed, as alleged, he was certainly "capable of being sheriff, of acting as sheriff, of holding the office of sheriff." It cannot be said in such case that he was "incapable of being elected," or ineligible as a candidate, or ineligible to hold the office. The disqualifications to election and to hold offices, found in the constitutions and statutes of the United States and the states, may be classed as those that will or may be removed before the time for assuming the office, and those that will not and cannot be so removed. In the latter case it is very clear the person cannot take the office, because he is not eligible to hold it. In the former he is eligible if the disability has been removed, and may take and hold the office unless he was disqualified from being a candidate.

"It has been the constant practice of the Congress of the United States since the rebellion to admit persons to seats in that body who were ineligible at the date of their election, but whose disabilities had been subsequently removed": McCrary on Elections, sec. 311. The disability provided in such cases was not from being elected, but from holding the office, and, when that disability was removed, the right to hold the office was recognized. Hon. John Y. Brown, of Kentucky, who was elected as a representative in the Thirty-sixth Congress before he was of the required age—twenty-five years—was allowed to take his seat and hold the ⁵⁸⁰ office upon arriving at that age, notwithstanding his ineligibility at the time of his election. In *State v. Smith*, 14 Wis. 497, the disqualification was held to apply to the right to hold the office, and not to the right to be elected thereto. In *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, it was held that an alien may be elected to the office of clerk of the county

board of supervisors, and, in case his disability is removed before the commencement of the term of office for which he is elected, he will be entitled to enter upon and hold such office. That case in its facts is identical with this, and, in that state, as in this, there was no constitutional or statutory provision on the subject of eligibility. The court, in considering the nature and effect of the disqualification, says: "In my judgment it is not that a person who is not an elector, only because of some disqualification which he has the power to remove at any time, is thereby rendered ineligible to be elected to a public office for a term which is to commence at a future time, but it is that a person thus disqualified shall not be eligible to hold such office. Such disqualification does not relate to the election to, but the holding of, the office." These cases are followed in *State v. Trumpf*, 50 Wis. 103, one of the judges expressing dissatisfaction with the rule announced in *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489. From these authorities it seems quite clear that when the disqualification of one elected to an office is against his holding the office, and that disqualification is removed in time for him to take and hold it, he may rightly do so.

The appellant relies upon section 692 of the code, which provides for contesting elections to county offices upon the ground, among others, that the person declared elected, "was not eligible to the office at the time of the election." It is contended that this makes ineligibility relate to the time of election, and that one then ineligible to hold the office is ineligible to election, ⁵⁸¹ and, therefore, cannot qualify, though fully eligible at the time for doing so. In construing this language of the statute it should be remembered that courts must be slow to interfere with the choice of the people expressed at legally conducted elections, and that it is only when their choice is contrary to law that it will be set aside. If they elect one to serve them as sheriff who can legally qualify at the time required, no good reason appears for setting aside their choice. It is an eligible officer the law requires, and any person who can qualify himself to take and hold the office is eligible to it at the time of the election. The construction claimed would prevent the election of one not of the required age at the time of the election, though he would attain to that age in time to take the office. It would prevent the election of one who would not be entitled to his second papers until after the election, though he could obtain the same and fully

qualify by the time for taking the office. It is in harmony with the recognized rights of the people to freedom of choice in the selection of their officers to say that, in the absence of any provision as to qualifications for election, they may choose any person who is or may become eligible to take and hold the office at the time required for qualifying. If their choice shall be one who cannot qualify, it must be disregarded, for, as we have seen, it is only those who are eligible that can hold an office. If the person declared elected was under disabilities that could be removed, so as to render him eligible to take the office at the time required, we think it would be no ground for contest that he was not eligible to take the office at the time he was elected; in other words, one who may be eligible at the time for qualifying is eligible to the office at the time of election. The judgment in cases of contest as to county offices is "whether the incumbent or any other person was duly elected": Code, sec. 714. If the contest is upon the ground of ⁵⁸²ineligibility, and the ineligibility is such as cannot be removed in time to take the office required, the judgment must be that the party was not duly elected, for the reason that he could not hold the office. If the ineligibility is such that it will or may be removed in time to qualify, the judgment must be that the person was duly elected. In such case, if the party fails to remove his disqualification, it would have the same effect as a failure to qualify in any other respect.

5. Under section 685 of the code sheriffs are required to qualify "by the first Monday of January following their election." Section 1, chapter 54, of the laws of 1886, allows them ten days thereafter, if "prevented by sickness, the inclement state of the weather, or other unavoidable casualty" from qualifying by the first Monday. Section 687 allows twenty days after the decision in case of a contest. Section 686 provides that a failure to qualify within the time prescribed shall be deemed a refusal to serve, and section 784 that the incumbent shall "hold office until his successor is elected and qualified." The appellant contends that, as Van Beek did not qualify on the first Monday, he must be held to have refused to serve, and that the appellant is entitled to hold the office until his successor is elected and qualified. It is a sufficient answer to this contention that appellant by injunction prevented both Van Beek and the board from acting in the matter of his qualification on that

first Monday. With this proceeding pending, Van Beek, though eligible, could not qualify on that day. It is so much in the nature of a contest that he was entitled to at least a reasonable time, if not the full twenty days, after the decision in his favor, in which to qualify. By this proceeding the time for qualifying was postponed until after the first Monday, and, by the time Van Beek was entitled to qualify, he was eligible to take and hold the ⁵⁸³ office. The date at which Van Beek was required to be eligible was the date at which he was required to qualify. His naturalization preceded that date, and was not, therefore, retroactive. These questions raised by the demurrer were preserved on the final submission. The foregoing discussion fully disposes of all questions presented and argued, and leads us to the conclusion that the judgment of the district court should be affirmed.

ROBINSON, C. J., dissented, saying: "I cannot assent to so much of the foregoing opinion as holds that a person may be elected to a county office in this state who was not eligible to hold office at the time of the election; nor do I think that any of the authorities cited can be regarded as sustaining the conclusion of the majority. The rule adopted in *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, has been approved by some courts, although it is worthy of notice that a member of the court which adopted it, in the case of *State v. Trumpf*, 50 Wis. 104, expressed the opinion that it would have been more in accord with principle to have held that one receiving votes for an office should be eligible at the time of the election, in order to be elected. His language was quoted with evident approval in *People v. Leonard*, 73 Cal. 230. The Wisconsin rule was cited in *Privett v. Bickford*, 26 Kan. 53, 40 Am. Rep. 301, where it was held that a person ineligible to hold an office when elected might hold it after disability had been removed. The question arose under a provision of the constitution of the state of Kansas, which is as follows: 'No person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, . . . shall be qualified to vote or to hold office in this state until such disability shall be removed by a law passed by a vote of two-thirds of all members of both branches of the legislature.' A person under the disability specified was elected to the office of sheriff, and his disability was afterward removed by the legislature. It was held that he could thereafter take the office, but stress was laid upon the fact that the constitutional disqualification related to the holding of the office, and not to the election. In *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489, the fact that there was no constitutional or statutory provision which affected the question decided was stated, and in *State v. Trumpf*, 50 Wis. 104, it was intimated that a different rule might apply where the persons to be elected to an office were required to be qualified voters.

"It does not seem to me that the custom of Congress in admitting persons to seats in that body who were ineligible at the date of their election, but

whose disabilities were subsequently removed, is entitled to much weight in this case, for the reasons that the qualifications of members of Congress are fixed by the constitution of the United States, which, excepting as to place of residence when elected, does not necessarily relate to the time of election, and each house of Congress is made the judge of the election returns and qualifications of its own members. It seems to me that the statutes of this state must determine the question under consideration, and that when properly construed they require that a person, to be eligible to a county office, must be eligible to hold the office when elected. Section 692 of the code provides that 'the election of any person to a county office may be contested by any elector of the county. . . . 2. When the incumbent [the person whom the canvassers declare elected] was not eligible to the office at the time of the election; 3. When the incumbent has been duly convicted of an infamous crime before the election, and the judgment has not been reversed, annulled, or set aside, nor the incumbent pardoned, at the time of the election.' Subsequent sections provide for the organization of a court, a trial, and judgment against the incumbent if it be found that he was not elected; and the trial may be had and judgment pronounced before the term of the office which the electors sought to fill shall commence. If the opinion of the majority be correct, a contest and trial might be made fruitless, and the judgment be made of no effect, if by lapse of time, or the naturalization of the incumbent, or the removal of his disabilities, he should, before the expiration of the time given within which to qualify, become eligible to hold the office. Another contest to determine whether he had become eligible might then be necessary.

"It is true that the opinion of the majority states that, if the court find the ineligibility is such that it will or may be removed in time to qualify, the judgment must be that the person was duly elected, and, that in case he fail to remove his disqualification, it would have the same effect as a failure to qualify in any other respect. No provision of the statute authorizing such a judgment, or requiring any supplemental proceedings after the judgment is rendered, is referred to, and I cannot think the rule announced has any support in our statute. The uncertainty and confusion which must result from this construction of the statutes in regard to the contesting of elections to county offices cannot have been intended by the general assembly. The phrase 'eligible to the office at the time of the election,' in my opinion, has a meaning too evident to be misunderstood, and should not be given the force of 'eligible to the office when the term begins,' by judicial construction.

"Section 1 of article 2 of the constitution of this state provides that 'every male citizen of the United States of the age of twenty-one years, who shall have been a resident of this state six months next preceding the election, and of the county in which he claims his vote sixty days, shall be entitled to vote at all elections which are now or hereafter may be authorized by law.' Section 4 of article 3 of the constitution provides that no person shall be a member of the house of representatives unless at the time of his election he 'shall have had an actual residence of sixty days in the county or district he may have been chosen to represent,' and the same qualification is required for senators. The evident purpose of the provision is to require that the person elected to the house or senate be a legal voter of the county or district he is chosen to represent at the time of the election; yet, under the rule of the majority opinion, that provision would be wholly inoperative, and it would be sufficient if the person chosen had an

actual residence of sixty days in such county or district when the time for taking his seat had arrived; or, in other words, he could be a nonresident of such county or district at the time of the election, and acquire the necessary residence after the result of the election is known. Section 6 of article 4 of the constitution provides that no person shall be eligible to the office of governor or lieutenant governor who shall not have been a resident of the state 'two years next preceding the election.' The meaning of this is obvious, but it may properly be considered with the other constitutional provision referred to, as strengthening the presumption which arises from the language of subdivision 2 of section 692 of the code, that the general assembly in enacting it intended to require that the person elected shall be eligible to hold the office at the time he is chosen.

"The views I have expressed find abundant support in the authorities. Under the constitution of Nebraska an elector must have resided in the state six months. The statutes of that state provide that the election of any person to any public office may be contested 'when the incumbent was not eligible to the office at the time of the election.' It will be noticed that this language is identical with that of subdivision 2 of section 692 of our code. But in the case of *State v. McMillen*, 23 Neb. 386, it was held that the person elected was required to be an elector at the time of the election. In that case the incumbent had not resided in the state six months at the time of the election, but had been a resident of the state more than six months when the term of office for which he had been a candidate began. The court referred to the Wisconsin and Kansas cases, but declined to follow them on the ground that the constitution and statutes of Nebraska were controlling, and held that the incumbent was ineligible. In *Territory v. Smith*, 3 Minn. 240, 74 Am. Dec. 749, it was held that the qualification of residence must be consummated at the time of the election, and that it would not be sufficient if completed at the time of entering upon the duties of the office. In *Searcy v. Grow*, 15 Cal. 118, a constitutional provision was under consideration, which reads as follows: 'No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state.' It was held that a person, to be eligible to an office under that provision, must be capable of taking the office at the time of the election. In *State v. Clarke*, 3 Nev. 566, a constitutional provision substantially the same as that of California quoted was construed, and the ineligibility thereby created was held to be want of capacity to be legally chosen to, and also want of capacity to legally hold, the office. In *Reynolds v. State*, 61 Ind. 404, it was held that, under a clause of the constitution, which provides that 'no person shall be elected or appointed as a county officer who shall not be an elector of the county, a person to be elected to a county office must be an elector at the time of the election.' The quotation from Cushing found in the opinion of the majority is in entire harmony with the cases I have cited. It recognizes the Wisconsin and Kansas rule and the custom of Congress, but holds that the phrases 'shall be eligible to a seat,' and 'shall be ineligible,' when found in the law in regard to the qualifications of a person for office, relate to the time of the election, and not to the time of assuming the official functions. In my opinion a person, to be eligible to election to a county office under the statutes of this state, must be capable of taking the office at the time of the election. The fact that to so hold would deprive one who appears to be most worthy, and the choice of the people, of an office on what, in this case, may seem to be technical grounds, is not a sufficient

reason for adopting a construction of our statutes not warranted by well-settled rules of interpretation, which would introduce endless confusion and uncertainty in the administration of our election laws.

"I am instructed to say that GRANGER, J., concurs in this dissent."

A question similar to one of the questions involved in the principal case was presented for decision in the case of *Shuck v. State*, 136 Ind. 63, and the opinion there announced was in conformity with that in the principal case. Shuck had been nominated and elected to the office of county auditor at an election held in November, 1890. On November 7th of the same year the county treasurer filed a statement with the governor to the effect that Shuck, as an ex-county treasurer, was in default in the sum of eighteen hundred and eighty-four dollars and six cents, and, basing his action upon these statements, the governor declined to issue the commission to Shuck on the ground that he was ineligible to hold office under section 10 of article 2 of the constitution of the state. On November 20, 1890, Shuck called at the office of the county treasurer, and inquired how much it was claimed that he was short in his accounts, and, upon receiving a response, procured the money for which it was claimed that he was in default, and immediately paid it over to the proper officer, and took his receipt therefor. This payment was made by him under protest, he, at all times, denying that he was in default. Thereafter he demanded his commission from the governor, but the county treasurer then claimed that the shortage was four thousand eight hundred and fifty-four dollars and eighty-four cents, and the commission was still withheld. The official bond of Shuck as auditor was filed November 18, 1890, but the commissioners refused to approve it, because he had no commission from the governor. Meanwhile, the former incumbent of the office continued to hold possession thereof until December 9, 1891, when the board approved Shuck's bond as auditor, and he at once entered upon the discharge of his official duties. Thereafter an action was brought against Shuck in which a general verdict, on June 17, 1892, was returned by the jury in his favor, but they also answered special interrogatories, and the court, upon such answers and on the relator's motion, on October 14, 1892, rendered a judgment in favor of the relator and against the defendant Shuck, and from this judgment he appealed. The ultimate decision of the case in the appellate court was held to depend upon whether or not Shuck was in default at the time of the commencement of his official term of office, and it was held that it was not material whether or not he was in such default at the time of his election, because the provision of the constitution of the state declaring a person so in default to be ineligible to office must be construed as meaning ineligible to hold office, and not merely ineligibility at the time of the election. Upon this point the court said: "In view of the record in this case we do not think it necessary that we should consider the rulings of the trial court upon the demurrers to the several paragraphs of the complaint. We may suggest, however, that the words 'eligible to any office,' as used in section 91 of the constitution of Indiana, mean 'eligible to hold the office,' and do not refer to the election. If a person is eligible to hold the office when the time for induction in office arrives he may take the office then, though not eligible to hold the office when elected. The words 'eligible to any office' relate to the capacity to hold the office and the term 'eligible' means regularly qualified." In support of these propositions the court cited the cases, *Brown v. Goben*, 122 Ind. 113; *Smith v. Moore*, 90 Ind. 294.

OFFICERS.—EQUITY JURISDICTION TO TRY THE TITLE TO OFFICE: See the extended note to *Fletcher v. Tuttle*, 42 Am. St. Rep. 236.

PUBLIC OFFICE—ELIGIBILITY.—A foreigner constitutionally ineligible to election to office at the time of his election, for want of declaration of intention to become a citizen, cannot hold the office, although after election, and before the commencement of his term of office, he duly declares such intention: *Taylor v. Sullivan*, 45 Minn. 309; 22 Am. St. Rep. 729, and note. An alien who has not declared his intentions to become a citizen of the United States may be elected to a public office, and may hold the same in case his disability be removed before the term of office begins: *State v. Murray*, 28 Wis. 96; 9 Am. Rep. 489. One who was disqualified under the constitution to "hold office" at the time of his election is eligible if the disability was removed before the issuing of the certificate and taking possession of the office: *Privett v. Bickford*, 26 Kan. 52; 40 Am. Rep. 301.

MEEK v. BRIGGS.

[87 IOWA, 610.]

WILLS—TITLE TO PROPERTY WHEN NOT VESTED IN THE BENEFICIARY.—A will purporting to devise and bequeath certain property to the testator's daughter, but naming certain persons as trustees to manage and control such property, and to apply the income and increase thereof to her support, comfort, and education, so far as required for such purposes, and declaring that the trust shall be deemed a limitation upon the title of the daughter, does not vest the legal title in her, nor give her any power to dispose of the property, though the will also confers upon the trustees power to turn the property over to her when they shall deem her fully competent and worthy to be intrusted with its care or control, or when she shall have married some worthy and competent man.

TRUST.—THE INTENT OF A DONOR TO CREATE A TRUST need not be expressly declared. It may be inferred from the powers conferred.

EXECUTION.—THE INTEREST OF A BENEFICIARY UNDER A TRUST DEED IS NOT SUBJECT to execution nor to garnishment when the estate is held by trustees with the power to take and keep possession thereof, and to apply the income and increase to the support, comfort, and education of such beneficiary, so far as may be required for such purposes. Her creditors can have no greater interest in the property than she possesses, and she cannot control the disposition of the trustees, nor require them to turn the property over to her. That result cannot be indirectly secured through the action of her creditors attempting to reach the property or its proceeds under process against her.

PERPETUITIES.—A WILL DEVISING AND BEQUEATHING PROPERTY TO TRUSTEES, to hold possession, and to apply the income and increase to the support, comfort, and education of the beneficiary, so far as may be required, and to turn the property over to her when they shall deem her competent and worthy to assume its control, or when she shall have married some worthy and competent man, does not create a perpetuity forbidden by a statute declaring that every disposition of property

is void which suspends the absolute power to control the same for a longer period than during the lives of persons then in being, and for twenty-one years thereafter. On the death of the beneficiary the estate will vest absolutely in the heirs at law.

Bolton & McCoy, for the appellant.

F. M. Williams, for the garnishee.

¶13 KINNE, J. The facts disclosed by this record are, that the plaintiff recovered a judgment against the defendants H. L. Briggs and Blanche A. Briggs for nearly two thousand dollars. Execution issued thereon, and the defendant L. O. Bliss was garnished, as a supposed debtor of Blanche A. Briggs. The garnishee answered before the commissioner that he was not indebted to the defendant, but disclosed that, as one of the trustees appointed by the will of William Wilde, ¶14 deceased, he held in his possession property of the value of over sixteen thousand dollars, in trust for Blanche A. Briggs, formerly Wilde. Blanche A. Briggs was a daughter of William Wilde, now deceased; that he held said property by virtue of the provisions of the will of the deceased. After making certain devises to other members of his family the testator's will provides:

"4. To my daughter, Ada Blanche Wilde, I give, devise, and bequeath the undivided one-fourth of the north thirty feet of lot 77, in the city of Dubuque, Iowa; also the sum of thirteen thousand three hundred dollars, in bills receivable and accounts, subject to the provisions of paragraph 7 of this will." Paragraph 7 is as follows:

"7. I hereby name and appoint my brother, Richard Wilde, my wife, Mary R. Wilde, and my friend, L. O. Bliss, trustees, without bond, to receive, manage, and control the property and funds hereby bequeathed and devised to my said daughter, Ada Blanche Wilde, hereby giving them full power to take possession of said property, both real and personal; to collect the rents from said real estate; to invest the moneys and credits in good, safe, interest-bearing securities; and in every way to care for and preserve the fund set apart to my said daughter in such manner as to them shall seem wise and prudent, applying the income and increase thereof to her support, comfort, and education, so far as shall be required for such purposes. The trust hereby created shall be held and construed as a limitation upon the title and interest vested in my said daughter by the fourth paragraph

of this will, and the same shall continue until, in the judgment of said trustees, she shall have become fully competent and worthy to be intrusted with the sole care and power of control of said property and funds, or until she shall be married to some competent and worthy man. In ^{¶15} either case, when they are satisfied that said devise and bequest will be safely and prudently cared for and preserved, they may surrender all trust funds and property to my said daughter, and the title shall then vest absolutely in her."

A copy of the will was attached to the answer. The plaintiff moved for judgment against the garnishee on his answer. The court overruled the motion, found that the garnishee was not indebted to either of the defendants, and discharged him, to which the plaintiff excepted.

1. If, by the terms of the will of the deceased, Ada Blanche Wilde took the legal title, as well as the beneficial use, of the property, both real and personal, then it necessarily follows that she had power to dispose of it, as the power to alienate is one of the incidents of an absolute gift and of an estate in fee. If such an estate vested in her, her power to alienate it could not be limited, as such limitation would be inconsistent with the enjoyment of the estate granted. The plaintiff insists that such is the effect of the provisions of the will which we have quoted. If his contention is correct, then the property in the hands of Bliss was subject to the plaintiff's garnishment: *McCleary v. Ellis*, 54 Iowa, 316; 37 Am. Rep. 205; *McCormick Harvesting Machine Co. v. Gates*, 75 Iowa, 344; 1 Perry on Trusts, secs. 386, 386 a, 386 b; *Deering v. Tucker*, 55 Me. 284; *Keyser's Appeal*, 57 Pa. St. 236. It becomes important, then, to determine whether the will in question vests an absolute title to the property in Ada Blanche Wilde.

The fourth provision expressly says that the gift and devise therein made are subject to the provisions of paragraph 7. That paragraph creates a trust, names the trustees, vests in them absolute authority to take possession of all the property, collect the rents, ^{¶16} invest the moneys, and pay over to the daughter, not a sum certain, but the "income and increase," so far as may be required for certain purposes. It then expressly provides that the trust created shall be held and construed as a limitation upon the title and interest vested in the daughter under the fourth clause of the will. It closes with a provision that when the trust fund and prop-

erty are turned over to the daughter the title shall vest absolutely in her. Now, the cardinal rule of construction applied to wills is to ascertain and give effect to the intention of the testator. If that intention can be gathered from the instrument it will always be carried into effect, unless to do so would violate some rule of law. Construing the clauses of the will together, there can be no doubt as to the testator's intention. It is clear that he did not intend that the daughter should have the property in question, nor the control or management of it, until the trustees, in their discretion, should see fit to give it to her. The provisions for the daughter show that the testator did not intend to give her title or possession of the property. If she held title, she might convey or incumber the real estate, or dispose of the personalty, and thus put it out of the power of the trustees to execute the trust. The very fact that they were required to take possession of the property, collect rents, and invest the funds, and pay over, from time to time, to the daughter, so much of the income as was necessary for her support, comfort, and education, implies that the interest of the trustees in the estate should be something more than mere control of it, subject to the will of the daughter. If, as the plaintiff contends, the will makes the daughter the absolute owner of the property, thereby vesting in her the absolute right of disposal of it at any time she sees fit, then is the intention of the testator set aside, and he might as well have given it all to her absolutely, without creating any trusteeship, ⁶¹⁷ because his provision therefor could be rendered ineffective at any moment the daughter saw fit to exercise her right of disposal of the property. In other words, the only way effect can be given to the manifest intent of the testator is to hold that the will creates a trust, and that the trustees take the legal title for the use and purposes provided in the will.

It is true that, in terms, the property in the case at bar is not bequeathed or devised to the trustees, nor need it be in order for them to take title. Where trustees are named in a will the law looks to see what powers are conferred upon them, what duties are required of them, and presumes that it was the testator's intention to give them such an estate as will enable them to execute the powers given, and perform the duties required: *Webster v. Cooper*, 14 How. 499. And it has been held "that, though no trust is declared in express terms, nor even mentioned, still the intention of the

donor to create the trust, and the existence of the trust itself, may be necessarily inferred from the powers and authority given to the grantee; and in case of wills, even where no estate is directly devised to the executors, but the whole estate is apparently given to the beneficiaries, the trust may be necessarily inferred from the powers and authority conferred upon the executors, and thus, from a construction of the entire will, the intention may be shown that the executors are to take the legal title as trustees of an express active trust": 2 Pomeroy's Equity Jurisprudence, sec. 1011; *Tobias v. Ketchum*, 32 N. Y. 327. A well-known exception to the rule prohibiting restraints upon the alienation of property, legal or equitable, is where a trust is "so created that no interest vests in the *cestui que trust*; consequently, such interest cannot be alienated; as, where property is given to trustees to be applied, in their discretion, to the use of a third person, no interest goes to the third person until the trustees have exercised ⁶¹⁸ this discretion. So, if property is given to trustees to be applied by them to the support of the *cestui que trust* and his family, or to be paid over to the *cestui que trust* for the support of himself and the education and maintenance of his children. In short, if a trust is created for a specific purpose, and is so limited that it is not repugnant to the rule against perpetuities, and is in other respects legal, neither the trustees nor the *cestui que trust*, nor his creditors or assignees, can divert the property from the appointed purpose. Any conveyance, whether by operation of law or by the act of any of the parties, which disappoints the purposes of the settler by diverting the property or the income from the purposes named, would be a breach of the trust": 1 Perry on Trusts, sec. 386 a; *Rife v. Geyer*, 59 Pa. St. 396; 98 Am. Dec. 351; *Barnes v. Dow*, 59 Vt. 530. The case at bar, in our judgment, comes within this exception. In *Barnes v. Dow*, 59 Vt. 530, the testator devised all his estate to his nephew, excepting the support of his sister during his lifetime. He then gave his estate in trust to his executor, and gave to the sister a support out of the estate during her life, and the remainder after the termination of the trust to the nephew. The court held that, to carry out the intention of the testator, the legal estate must be held to be in the executors in trust. It said: "If it appears from the will that it was the intent of the testator that the beneficiary should have nothing that she could dispose of, it will be as effectual

to protect the trust as if there was an express clause against alienation": *Keyser v. Mitchell*, 67 Pa. St. 473; *Perkins v. Hays*, 3 Gray, 405.

2. The next question that arises is, Is the will, as thus construed, void, as in contravention of our statute against perpetuities? That statute reads: "Every disposition of property is void which suspends the absolute power of ⁶¹⁰ controlling the same for a longer period than during the lives of persons then in being, and for twenty-one years thereafter": Code, sec. 1920. Under our law the word "property," used in the statute, includes personal as well as real property: Code, sec. 45, subd. 10. It may be conceded that the rule of law is "inflexible that every limitation is void unless it takes effect *ex necessitate*, and in all possible contingencies within the prescribed period": *Sears v. Putnam*, 102 Mass. 5; *Dana v. Murray*, 122 N. Y. 604. Suppose the conditions upon which the trustees are under the will authorized to transfer this property to the *cestui que trust* do not appear to them to exist during the lifetime of the latter. What, then, becomes of the estate? The testator has made no absolute provisions for such a contingency. He has not, in terms, provided in whom the estate shall vest in the supposed case. Clearly, the death of the *cestui que trust* before the transfer of the estate to her would terminate the trust, and the estate so held by the trustees would pass to the heirs of the *cestui que trust*. The whole will shows an intent on the part of the testator to dispose of all his estate. Under our construction of this will the legal title is given to the trustees, and they are vested with certain powers and charged with the execution of certain duties relating to the property, but this legal title is held for the *cestui que trust*, to be transferred to her upon certain contingencies. If the legal title still rested in the trustees at the death of the *cestui que trust*, then at her death both titles would merge and the estate pass to her heirs: See *Toner v. Collins*, 67 Iowa, 375; 56 Am. Rep. 346. If this be so, then the will is not open to the objection that the estate—the legal title—may not vest within the time fixed by the statute, as, if not vested by the trustees in the *cestui que trust* during her lifetime, in any event it would vest in the heirs of the *cestui que trust* at her death.

⁶²⁰ 3. We have, then, an estate, the legal title to which is in the trustees, and the equitable in the *cestui que trust*; and the question arises, Has the *cestui que trust* such an interest in the

property, under the terms of the will, as that the trustee can be made liable for her debts, as garnishee? We think the trustee cannot be held liable. If creditors of the *cestui que trust* may thus reach the property itself, or its income or increase, it must of necessity follow that, if their claims are large enough, the whole estate might be taken, and the purpose and object of the testator in creating the trust be defeated. The trust could not be executed, as the trustees would be deprived of the means of carrying out the testator's intention. It is certain that the testator endeavored to provide against just such an emergency as has arisen in this case. He intended to place the property and its income beyond the reach of the *cestui que trust* to squander. This he had a perfect right to do. He was disposing of his bounty without any valuable consideration, and we know of no rule of public policy or sound morals being violated by a proper attempt to provide against the misfortune or improvidence of the object of his bounty. No creditor can complain, as it could hardly be claimed that credit was, in such a case, extended on the faith of property held by the *cestui que trust*, when the legal title was not in her. As was well said by Morton, C. J., in *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504: "Under our system creditors may reach all the property of the debtor not exempt by law, but they cannot enlarge the gift of the founder of a trust, and take more than he has given." This language was used in a case where property was conveyed in trust, with a condition that the income should not be alienated by the beneficiary by anticipation, or be subject to be taken by his creditors, although there was no limitation over of the estate on the happening of such ⁶²¹ an event. Justice Miller, in *Nichols v. Eaton*, 91 U. S. 716, said: "No case is cited, none is known to us, which goes so far as to hold that an absolute discretion in the trustee—a discretion which, by the express language of the will, he is under no obligation to exercise in favor of the bankrupt—confers such an interest on the latter that he or his assignee in bankruptcy can successfully assert it in a court of equity, or any other court." The doctrine announced is fully supported by the authorities: *Rife v. Geyer*, 59 Pa. St. 393; 98 Am. Dec. 351; *White v. White*, 80 Vt. 338; *Leavitt v. Breirne*, 21 Conn. 1; *Pope v. Elliott*, 8 B. Mon. 56; *Smith v. Towers*, 69 Md. 77; 9 Am. St. Rep. 398; *Barnes v. Dow*, 59 Vt. 530; *Beck's Estate*, 133 Pa. St. 51; 19

Am. St. Rep. 628; Drake on Attachment, sec. 454. It is the settled rule of law that the creditor's situation with reference to the fund is the same as Ada Blanche Wilde's would be if she was suing the trustees; that is, the creditor has no better right to it, as against the trustees, than the beneficiary has. Tested by this rule, how can it be successfully claimed that the creditor can hold the garnishee liable? Mrs. Briggs could not maintain an action against the trustees for any part of this property. They are clothed with a certain discretion, vested in them by the terms of the will; and certainly no court would, under such circumstances, compel the trustees, while the trust was alive, to violate its terms, and convey or turn over the property to the beneficiary. Nothing is due the *cestui que trust*. The trustees have not as yet, under the discretion vested in them, seen fit to turn over the property to her. That discretion, wisely, as we think, vested in the trustees, cannot ordinarily be controlled by the courts. To hold this trustee subject to plaintiff's garnishment is to subvert the very purposes of the trust, and invade the domain where the testator's will, being in conformity to the law, is supreme. ⁶²⁸ The testator was not compelled to so dispose of his estate to his daughter as that creditors might reap the benefits of it, instead of its being preserved to the object of his bounty. They are presumed to know the contents and legal effect of the will, and it can not for a moment be conceded that they were misled into extending credit under a well-founded belief that Mrs. Briggs held the legal title to the property. As the right of the *cestui que trust*, against the trustee, to recover the property is the measure of the rights of the creditor as against the property in the hands of the garnishee, and as the *cestui que trust* has no right to the property which she can enforce, it follows that the action of the court below was proper, and its judgment is affirmed.

WILLS—TRUSTS—ALIENATION OF PROPERTY BY BENEFICIARY.—A devise of a beneficial life estate, so as to secure its enjoyment to the beneficiary, without making it alienable by him, or subject to the claims of his creditors, will be respected by the courts of Maryland: *Smith v. Tower*, 69 Md. 77; 9 Am. St. Rep. 398, and extended note. See, also, the extended note to *Doggett v. Hart*, 58 Am. Dec. 474, where the question is discussed as to when the legal title vests in the *cestui que trust*.

TRUSTS—CREATION—NECESSITY FOR DECLARATION OF INTENTION.—The intention of a testator to create a trust must be apparent from the face of his will: *Boyle v. Boyle*, 152 Pa. St. 108; 34 Am. St. Rep. 629; *Estate of*
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Smith, 144 Pa. St. 428; 27 Am. St. Rep. 641, and note. See, also, the extended note to *Williamson v. Yager*, 84 Am. St. Rep. 202.

TRUST ESTATES—WHEN SUBJECT TO DEBTS OF CESTUI QUE TRUST.—Estates of every kind held in trust are subject to the debts of persons for whose benefit they are held, although the instrument creating the trust may provide otherwise, unless the trustee is given a discretionary power to withhold all payment or benefit from the *cestui que trust*: *Bland v. Bland*, 90 Ky. 400; 29 Am. St. Rep. 390, and note.

PERPETUITIES.—When created, and the rule against: See *Lawrence's Estate*, 136 Pa. St. 354; 20 Am. St. Rep. 925, and note, and the extended note to *Barnum v. Barnum*, 90 Am. Dec. 101.

TWISS v. GUARANTY LIFE ASSOCIATION.

[87 IOWA, 783.]

CORPORATIONS—ULTRA VIRES.—A CONTRACT, WHEREBY A GUARANTY LIFE ASSOCIATION UNDERTAKES to pay losses which may accrue against another and similar association, is an attempt to divert the funds to objects not authorized by its charter, and is therefore *ultra vires* and void.

CORPORATIONS.—IF AN ULTRA VIRES CONTRACT IS PERFORMED BY ONE SIDE, the other contracting party cannot be permitted to enjoy the benefits received, and will be required in a proper action to account; but one whose condition has not changed or been prejudiced by the *ultra vires* contract cannot compel its enforcement.

Caswell & Meeker, for the appellant.

Mitchell & Dudley, and Nourse & Nourse, for the appellee.

784 ROTHROCK, J. 1. It is admitted that David M. Twiss held a valid policy of insurance upon his life in the Guaranty association, and that the same was in full force at the time of his death, which occurred in the month of May, 1889, and that the plaintiff herein is the beneficiary under said policy. The appellant was in no way a party to the contract of insurance, but it is claimed that it is liable to pay the amount of the loss, by reason of an alleged written contract, which it is claimed was entered into between the said two insurance companies after the death of said David M. Twiss. The written agreement was made and entered into by one H. S. Halbert, who was secretary of the Southwestern association, and by one Pickell, who styled himself president of the Guaranty Life Association. The following is a copy of said written agreement:

“*This agreement*, made and entered into between the Southwestern Mutual Benefit Association, of Marshalltown,

Iowa, and the Guaranty Life Association of Des Moines, Iowa, and H. M. Pickell, as trustee for the benefit of the policy holders, severally, of said last-named company, *witnesseth*; that the said company first above named hereby agrees with the said Guaranty Life Association and H. M. Pickell, as trustee, that it will, in consideration of the transfer to it by the Guaranty Life Association of all its assets, books, and furniture, perform all and singular the undertakings, agreements, and covenants heretofore made and now outstanding against said Guaranty Life Association in favor of its policy holders, and will pay all its liabilities for losses unpaid. In consideration of the premises the said Guaranty company agrees that it will, and it does hereby, transfer and convey unto said first above-named company all its books, furniture, and its assets of every kind and nature, and agrees not to further ⁷²⁵ transact its business of life insurance in the state of Iowa or elsewhere.

“SOUTHWESTERN MUT. BENEFIT ASS’N,
[SIGNED] “By H. S. Halbert, Secretary.
“GUARANTY LIFE ASSOCIATION,
“H. M. Pickell, President.

“Des Moines, Iowa, June 18, 1889.”

There can be no doubt that, if this were a valid agreement, it is an end of the controversy. It plainly provides that the appellant shall pay all the liabilities of the Guaranty company for losses unpaid. The policy in suit was a valid, existing, unpaid loss. But it is contended in behalf of the appellant that the written agreement is void because it was an act and undertaking not authorized by the corporate articles of association of either of the defendants, and that it was entered into by the parties, and the same was signed, without authority from their respective boards of directors. It is further claimed that said Pickell induced said Halbert to sign the agreement by certain alleged false and fraudulent representations as to the resources of the Guaranty company, and that said agreement is void by reason of said fraud. We do not regard it necessary to examine this question of fraud. The evidence is in conflict with reference thereto, and a jury might properly find for either party on that issue. And it is unnecessary to determine whether Pickell, the alleged president of the Guaranty Life Company, was authorized by his board of directors to make the contract upon which the action is founded.

We have directed our attention to the question as to whether the contract was such an obligation as the Southwestern association was authorized to make by its articles of incorporation. If it was in excess of its power it is void, and cannot be enforced as a contract; and while in such a case, where an *ultra vires* contract ⁷⁸⁶ has been partly performed, the party repudiating it may be compelled to account for whatever benefits may have been received by reason of it, yet this exception, or rather modification, of the rule has no application in the case at bar. The fact is that the appellant did not receive any real benefit from the transaction. It paid the sum of fifteen hundred dollars to the said Pickell, and received in return about twelve hundred dollars, and some office furniture worth about one hundred dollars. It is true that the two persons who assumed to make this contract undertook to transfer the membership of the Guaranty company to the appellant company, and, in response to a circular sent out to said members, about four hundred of them did agree to the transfer. Much has been urged in argument to the effect that the appellant, by reason of this accession of members, has received a sufficient consideration to uphold the transaction, or to require it to pay the losses of the Guaranty company. We do not think that this claim can be maintained. The aggregate amount of said losses is about eleven thousand dollars. If the appellant should pay that amount for four hundred members it would be a palpable fraud upon all of the other members of the appellant company. It would be the payment of a bonus of about twenty-five dollars each for new members. It would be a withdrawal and appropriation of eleven thousand dollars of trust funds, without the semblance of any authority to do so, either by the insurance laws of this state, or by any provision of the articles of incorporation. This proposition is so plain that it requires no further consideration.

That the making of the contract was in excess of the power of the appellant there should be no question. We need not set out the articles of incorporation or the by-laws. It is enough to say that the contract, so far as it attempts to bind the appellant, is contrary to the ⁷⁸⁷ whole scope and purpose of the corporation. The payment of these losses would be a diversion of trust funds to other objects than those authorized by the charter, and would be a crime: Code, sec. 1072. Both of these companies were organized upon the assessment plan.

The assessments were made quarterly, and a fixed amount was required to be paid. A certain amount was set apart for an expense fund, and the remainder was designated as the mortuary fund. The articles of association explicitly provide as to the disposition to be made of these several funds. There is not one word in the whole record which by the remotest implication can be construed as authorizing the secretary, or even the board of directors, to use any part of the proceeds of these quarterly payments for such a purpose as paying the death losses of any other insurance company. It is unnecessary to further discuss this question. It appears to us that the undertaking to pay the losses of the Guaranty company is plainly in excess of the power of the appellant or any of its officers. The facts of the case bring it within the rules announced in *Lucas v. White Line Transfer Co.*, 70 Iowa, 542; 59 Am. Rep. 449; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221. And see, also, 2 Morawetz on Private Corporations, secs. 580, 581, 591, 607, 609.

2. But it is claimed in behalf of the appellee that the contract is executed, and that the appellant is estopped from questioning its validity. As we have said, where an *ultra vires* contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account; in other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate wrong and injustice. But this case presents no such features. It is conceded that the Guaranty company was bankrupt when the contract in question ⁷³⁹ was made. Complaint had been made to the state auditor that it was not paying its death losses promptly, and it was unable to obtain a certificate authorizing it to continue in business. It is said by counsel for the appellee, in argument, that for the payment of these death losses the Guaranty had no means whatsoever, except its annual premiums, payable in quarterly installments. It had no certificate authorizing it to do business after March, 1889. The death losses had been such as to require the proceeds of the mortuary calls to meet the claim, and, in addition, had used up the reserve fund. It was in this condition when the insured, David M. Twiss, died, and the claim of the plaintiff accrued.

It is urged with apparent confidence that, as there were some five hundred and sixty-seven members of the Guaranty company when it failed, the appellant should be required to

pay its death losses upon the ground that by the contract it acquired some four hundred new members. We have already said that the appellant was not authorized to buy members in this way, and on any such terms. Let us see whether there is any ground for the alleged estoppel. If there is any reason for such a claim it must be because the appellant, by seeking a transfer of the membership, put it out of the power of the plaintiff to compel payment by the Guaranty company. The wrong and injury to the plaintiff, if any, consists in taking away the membership so that the members did not pay their quarterly dues to the Guaranty company, by the payment of which the plaintiff would have received the amount due on the policy. It appears to us that this is a most unwarranted assumption. It is based upon the theory that, if the contract had not been made, the five hundred and sixty-seven members would have continued to pay quarterly installments to the Guaranty company until all of the death claims were satisfied ⁷³⁰ and all other claims paid. That this would have occurred is not only not probable, but highly improbable. Members of such organizations are not more likely to pay money for nothing than other people. The fact is, the record shows beyond all question that, if the contract had not been made between the two companies, the plaintiff's claim was absolutely worthless. That the position of the plaintiff was in any manner changed, to her prejudice, by the contract, not only does not appear, but the face of the transaction shows that it was not. That is about all there is of this case. It was tried by a jury, and the defendant moved that a verdict be directed for the defendant. The motion was overruled. We think it should have been sustained, on the ground that the conceded facts in the case showed that the plaintiff was not entitled to recover. **Reversed.**

CORPORATIONS—ULTRA VIRES—ACTS IN EXCESS OF POWER CONFERRED BY CHARTER.—Acts done in excess of the power conferred by a corporate charter are void in the sense that they can have no effect to divest the corporation of any right in or to any property belonging to it: *Franco-Texas Land Co. v. McCormick*, 85 Tex. 416; 34 Am. St. Rep. 815, and note.

CORPORATIONS—ULTRA VIRES AGREEMENTS—PARTIAL EXECUTION—ACCOUNTING.—An *ultra vires* contract will not be specifically enforced in equity, nor will an action at law lie thereon, but if it has been partially or completely executed by either of the parties, he may, by proceeding in the proper court, recover to the extent of the benefit received by the other party: *Greenville Compress etc. Co. v. Planters' Compress etc. Co.*, 70 Miss. 669; 35 Am. St. Rep. 681, and note, with the cases collected.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

**HITCHCOCK v. SUPREME TENT OF KNIGHTS OF
MACCABEES.**

[100 MICHIGAN, 40.]

DAMAGES PURELY SPECULATIVE in character, and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable.

DAMAGES—MEASURE OF—LOSS OF PROFITS.—If one party breaks a contract which the other party has partly performed, and the violator then performs and completes the work himself from which he reaps the profits which the other party might have made, he cannot escape liability for damages if the other party can show the profits made while he was executing it, and the benefits received from its subsequent completion. The measure of damages is the profits and benefits remaining after the cost of doing the work has been deducted from the amount agreed to be paid for doing it.

Rowland Connor, for the appellant.

McDonell & Hall, for the respondent.

⁴¹ GRANT, J. The defendant is a corporation organized under the laws of this state, and authorized to issue endowment certificates, payable on the death of members to beneficiaries selected by them, and is operated under the lodge system, the lodges being known as "tents." It was ⁴² incorporated in 1885 by five incorporators, who constituted the board of trustees. A Mr. Boynton was secretary and one of the trustees, and to him was committed the chief management of the association. The organization appears to have met with great favor, and before the close of the first year was in active operation in many states and in Canada. It had from fifty to seventy-five agents engaged in organizing

tents. These agents were compensated by a part of a membership fee, a certificate fee, and a quarterly *per capita* tax. No tents could be instituted with less than fifteen members in places of five thousand population or under, or with less than twenty-five members in places of over five thousand population. Plaintiff was a man of considerable experience in organizing associations of this character. Negotiations between him ⁴³ and Mr. Boynton resulted in the execution of a contract dated October 5, 1885, by which plaintiff was given the sole control of instituting and organizing new tents or subordinate bodies in the state of Indiana. The contract fixed the following compensation for his services:

"1. Sixty dollars of the charter fee for each tent he or his deputies may institute in said state of Indiana.

"2. All the membership fee on all over fifteen, and under twenty-five, members put in new tents on organization.

"3. One-half of the membership fee on all members put into new tents on organization, over twenty-five members.

"4. All the *per capita* tax collected by him from the first fifteen members in each new tent.

"5. One-fourth of the annual *per capita* tax on the entire membership in the state of Indiana shown to be in good standing on the books of the supreme tent at the close of each quarterly term, the said money to be paid to the said Hitchcock within thirty days thereafter.

⁴⁴ "6. He shall also receive as compensation for visiting organized tents within the state, with a view of building them up and increasing their membership, all the quarterly *per capita* tax paid in by new members secured in such work, and also such portion of the membership fee as may be agreed upon between him and the tents. The aforesaid proportion of charter fee, membership fee, *per capita* tax, etc., shall be full and complete compensation for such services."

It provided, further, that plaintiff should give his full time and services to the work, and execute a good and ⁴⁵ sufficient bond, in the sum of five hundred dollars for the faithful performance of his duties, and the turning over of all moneys belonging to the supreme tent. It also contained the following provisions:

"It is further agreed between the parties hereto that, whenever a great camp is organized in said state, then this agreement shall be null and void, and of no binding force. It is also agreed that, whenever either party to this agreement de-

sires to cancel the same, at least thirty days' notice ⁴⁶ must be given by the party so electing. This agreement cannot be canceled without the consent of all parties to the contract."

No great camp could be organized in any state until there were at least fifty tents and two thousand members.

Plaintiff furnished his bond, received his commission, and immediately entered upon the work. In thirteen months he had organized ten tents, with a total membership of two hundred and sixty-eight. The defendant then broke the contract, early in 1887, and demanded a surrender of plaintiff's original commission, which he refused, and then left its employ. The defendant immediately placed other agents in the state, who established forty more tents, and brought the membership up to a sufficient number to establish a great camp.

Upon the trial the learned circuit judge directed a verdict for the plaintiff, under clause 5, for one-fourth of the annual *per capita* tax paid in by the members of the ten tents which he organized, and who continued as members, which, with interest, amounted to four hundred and fifty-four dollars and twenty-five cents. As to the other damages claimed, the judge held that they were speculative, that there were no certain data from which they could be computed, that they were uncertain of ascertainment, and directed a verdict for the defendant.

All questions arising under this contract, except that of damages, have been determined in favor of plaintiff by the verdict and judgment. From this determination defendant has not appealed. The only question, therefore, before this court is the ruling of the court below as to the measure of the damages. Plaintiff insists that he introduced and offered evidence from which the jury might, with reasonable certainty, determine the profits which he might have made, but which were lost to him by the violation of the contract. He gave evidence tending to show the profits made on the contract while he was engaged in the work. He offered to show that the first labor of ⁴⁷ starting the enterprise is more expensive than that which follows, and that after the work is fairly started it is easier to organize tents than at first. He also offered a statement taken from the books of the defendant, showing the organization of forty tents after the breach of the contract; one hundred and twenty-five members in new

tents, over fifteen and under twenty-five; sixty-six members in new tents, over twenty-five; and the total number of new members. From this statement he made up his total claim, as follows: Charter fees, forty tents, two thousand four hundred dollars; membership fees under clause 2 of the contract, six hundred and twenty-five dollars; membership fees under clause 3, one hundred and sixty-five dollars; *per capita* tax under clause 4, three hundred dollars; *per capita* tax under clause 5, two thousand nine hundred and fifty-six dollars and eighty-three cents.

The rule governing these cases is established by an unbroken line of authorities—that damages which are purely speculative in character, and dependent on so many contingences that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable. The difficulty lies in determining whether the facts of a particular case bring it within or without this rule. There is no sounder basis for damages for breach of contracts of this character than the profits, when they can be determined with proximate and reasonable certainty. In fact, there is no other basis. Their loss is the natural and proximate result of a breach, which the law presumes that each party foresees. The rule does not require that such data be furnished that they can be computed with mathematical exactness. When one breaks a contract which the other party has partly performed, and the violator then performs the work himself, from which he reaps the profits which the other party might have made, he cannot escape liability for damages if such other party can show the profits made while he was executing it, and the benefits received from its subsequent completion. The contract in this case was specific and definite in all respects, fixing ^{as} the amount of work and the price. It was contemplated that the plaintiff should make profits, and the defendant was to be benefited by his work. These results were being successfully accomplished when the contract was broken. In case of a breach by plaintiff, defendant could perform the work, and recover as damages the difference between the price agreed upon and the cost of completion. In case of a breach by defendant the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment. There is no presumption, legal or otherwise, that the plaintiff

could not have completed the work. The defendant was satisfied with the success of the plaintiff. It is a fair presumption that he would have succeeded. It is a fair inference from the evidence that the defendant's officers broke the contract because of this success, and the belief that they could secure the accomplishment of the work cheaper, which they in fact did. The defendant took advantage of the work which the plaintiff had done, and completed it. The defendant may not now say, "It is true I completed the work, but there is no certainty you could."

This is not a case where one party agrees to sell goods for another for a year, to receive as compensation his share of the profits made; but it is a case where one agrees to sell a certain amount of goods, with no limit as to time, at a given price, and for a given compensation, and also where the goods have been sold at the same price within the agreed territory, and within the time contemplated. It has been demonstrated, not only that the work could be, but that it has been, done. It is a fair inference that it could have been done as well by the plaintiff as by the defendant. One element of damage is established by the contract, and the evidence from the ⁴⁰ defendant's own books, viz., the amount agreed to be paid, and the benefits reaped by it. The only other element is the cost of doing the work, which, deducted from the amount to be paid, would establish the profits. The expense of what plaintiff did is some evidence upon which to base a judgment of the expense of doing the rest of the work. If that be the only evidence as to the cost, and plaintiff can establish by experience that it is more difficult and expensive to accomplish the first part of the work than the last part, defendant cannot complain if the jury take that as a basis to determine the cost. On the contrary, such basis would be favorable to the defendant; and, if this was the only basis, we think, under the circumstances of this case, it was sufficient to justify a submission of the case to the jury. He who breaks his contract may not deny to the injured party the fair inferences to be drawn from the part performed.

In *Bagley v. Smith*, 10 N. Y. 489, 61 Am. Dec. 756, one partner sued another for breach of the partnership articles, and recovered profits lost by the unauthorized dissolution. The court say: "The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures, of the damages to be given upon a breach of con-

tract. . . . It is very true that there is great difficulty in making an accurate estimate of future profits, even with the aid of knowing the amount of the past profits. This difficulty is inherent in the nature of the inquiry. We shall not lessen it by shutting our eyes to the light which the previous transactions of the partnership throw upon it. Nor are we the more inclined to refuse to make the inquiry by reason of its difficulty, when we remember that it is the misconduct of the defendant which has rendered it necessary."

A review of the vast number of authorities upon this subject would involve a critical statement of the facts of ⁵⁰ each case, and the writing of an opinion of unnecessary length. It is sufficient to say that we think this case comes within and is ruled by the following authorities: *Wakeman v. Wheeler etc. Mfg. Co.*, 101 N. Y. 205; 54 Am. Rep. 676; *Treat v. Hiles*, 81 Wis. 280; *Mueller v. Bethesda Mineral Spring Co.*, 88 Mich. 390; *Oliver v. Perkins*, 92 Mich. 304. The case of *Wakeman v. Wheeler etc. Mfg. Co.*, 101 N. Y. 205, 54 Am. Rep. 676, is similar in its facts to the present case, and many of the authorities are there collated and discussed.

Judgment reversed, and new trial ordered.

The other justices concurred.

DAMAGES—SPECULATIVE—RECOVERY OF.—Damages for a remote and speculative loss of profits cannot be allowed, and an award rendered on such a basis will be set aside: *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313, and note; *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416; 65 Am. Dec. 602, and note; *Abbott v. Gatch*, 13 Md. 314; 71 Am. Dec. 635. Speculative or prospective profits are not proper elements to be computed in assessing damages for a breach of contract; but profits which are the direct result and fruits of the contract may be assessed for a breach thereof: *Cates v. Sparkman*, 73 Tex. 619; 15 Am. St. Rep. 806, and note. See, also, the notes to *Barker v. Mann*, 96 Am. Dec. 378, and *Adams Express Co. v. Egbert*, 78 Am. Dec. 387.

DAMAGES.—LOSS OF PROFITS: See the extended note to *Sitton v. MacDonald*, 60 Am. Rep. 488, and the note to *Martin v. Deets*, 41 Am. St. Rep. 163, where the cases are collected.

WEBBER v. RAMSEY.

[100 MICHIGAN, 58.]

MORTGAGES—TIMBER AS PART OF MORTGAGE SECURITY—LIABILITY OF PURCHASER.—A purchaser from a mortgagor of timber standing on the mortgaged premises and forming a valuable part of the mortgaged security, with constructive notice of the mortgage at the time of his purchase, and with actual notice of its existence and of the insolvency of the mortgagor at the time he commences to cut such timber, is liable to the mortgagee for the value of the timber taken, in the event that upon foreclosure and sale of the mortgaged premises the proceeds are not sufficient to satisfy the mortgage debt.

MORTGAGES—RECORD OF AS NOTICE OF LIEN ON TIMBER.—A record of a mortgage of land on which is growing timber is constructive notice to the purchaser of the timber from the mortgagor of the lien of the mortgage thereon.

MORTGAGES—IMPAIRING SECURITY.—A mortgagee has a right to the whole security to meet the amount of his mortgage encumbrance, and cannot be compelled to take a part.

G. E. Nichols and F. D. M. Davis, for the appellant.

W. O. Webster, for the respondent.

60 LONG, J. September 16, 1885, Levi Shotwell and wife executed a mortgage to the plaintiff for seven thousand dollars, with interest at seven per cent, payable annually. The mortgage covered two hundred and fifty-four acres of land, and was recorded in the office 61 of the register of deeds on the day of its execution. The mortgage contained an interest clause providing that, should any default be made in the payment of the interest, or any part thereof, on any day when payable, and the same should remain unpaid for twenty days, the principal, with all arrearages of interest thereon, should, at the option of the holder of said mortgage, become due and payable. September 16, 1889, Shotwell made default in the payment of the annual installment of interest. October 21, 1889, defendant in this suit purchased from Shotwell the timber on twelve acres of the mortgaged land, paying two hundred and twenty-five dollars therefor, and taking a bill of sale of said timber from Shotwell. At the time of this purchase the defendant had no actual knowledge of the plaintiff's mortgage, though it was of record, but he was informed of it before he entered upon the land, and cut and removed the timber. October 24th of that year Shotwell made a common-law assignment of all his property to Laban A. Smith, and on the final settlement of that estate it paid only one cent and forty-eight one hundredths on a dollar

of his unsecured indebtedness. October 26th defendant saw Shotwell, and ascertained that he had made such an assignment. He then called upon the assignee to get his permission to cut the timber, and was advised by him that the plaintiff would be injured by the cutting of the timber. On Sunday, October 27th, defendant entered upon this twelve acres with a force of men, and commenced to cut the timber. While proceeding with this work, and on November 1st, the plaintiff exercised his option under the interest clause in his mortgage, and commenced a suit in the circuit court for the county of Ionia, in chancery, to foreclose the mortgage, and made Shotwell and his wife, the assignee, and the defendant herein defendants in that suit. An injunction was allowed by the court, restraining the defendant from cutting or removing the timber in question, but it was afterward modified, and the defendant ⁶² allowed to remove the timber already cut, but restraining him from any further cutting. Subsequently, the complainant, in the foreclosure suit, by a stipulation between the solicitors and the order of the court thereon, dismissed his bill of complaint as to defendant Ramsey without prejudice, and thereupon the suit proceeded to a decree against the other defendants. The decree of foreclosure was for eight thousand one hundred and sixty-three dollars, and was dated December 22, 1890. On February 21st following, the premises were sold under said decree, and struck off to the plaintiff here for six thousand five hundred dollars, he being the highest bidder, and that being the highest sum offered for them. The circuit court commissioner who made the sale reported a deficiency of one thousand eight hundred and thirty-seven dollars and eighty-four cents, and the sale was duly confirmed. No execution was ever issued for the collection of this deficiency.

This action was brought by the plaintiff to recover from defendant Ramsey the value of the timber taken from the land. The cause was heard before the court without a jury, and the court made findings of fact and law, and entered judgment for plaintiff for three hundred dollars, finding that sum to be the value of the timber taken. The court found as a fact that the trees and timber standing and growing upon the mortgaged premises constituted a valuable part of the security for said mortgage indebtedness, and that the cutting of the same injured and deprived the plaintiff of his said security to the extent of the value of said trees and tim-

ber cut down and removed. Exceptions were taken to the conclusions of law, and the points raised for consideration here, as claimed by defendant's counsel, are: 1. That, as matter of law, the defendant is entitled to the judgment; 2. That, by reason of there never having been issued any execution for the deficiency on the sale on said foreclosure, the plaintiff is not entitled to recover; 3. That, defendant having purchased the timber of Shotwell in good faith, and paid for the same before notice of ⁶³ the mortgage, he was entitled to remove such timber from the land; 4. That plaintiff had no interest in the land that would enable him to recover from the defendant for the alleged trespass by way of taking the timber that defendant had purchased, and that the plaintiff had no possessory rights before foreclosure.

The main contention upon the part of defendant is that the facts found by the court below do not warrant a recovery; that in order to enable the plaintiff to recover it must appear that the defendant, at the time of his purchase of the timber, knew that the mortgagor was insolvent, and that the taking of the timber would impair the plaintiff's security; and that, inasmuch as the court found the mortgaged premises to be worth about eight thousand dollars at the time the timber was cut, and there was no finding that defendant knew of Shotwell's insolvency, judgment should have been given for defendant. It is conceded that circumstances may exist under which a mortgagee might recover for the removal of timber or other things from mortgaged premises by another; but it is claimed that such facts are not shown here; that, in order to recover, it must be shown that the purchasing and cutting of the timber was done by the defendant, knowing that the mortgagor was insolvent, and that the mortgagee's security would be impaired.

The findings of fact made by the court amply support the judgment. The mortgage was duly recorded before the sale of the timber was made to the defendant. He had constructive notice of the mortgage, therefore, before the purchase was made by him. Before any timber was cut he had actual notice of the mortgage and of the insolvency of the mortgagor. Notwithstanding such notice he went upon the premises on Sunday with a force of men and did the cutting. He knew at this time that the removal of the timber would impair the security of the ⁶⁴ mortgagee. The mortgage was a valid encumbrance upon the land, and the

mortgagee had the right to the whole security to meet the amount of his mortgage encumbrance, and could not be compelled to take a part. The facts found by the court below show conclusively that the defendant was not acting in good faith in cutting the timber, and in attempting to remove it. Upon the sale of the premises it was demonstrated that the mortgage security was lessened by the act of the defendant. It is not like some of the cases cited by defendant's counsel, where the property removed had gone into the hands of an innocent purchaser after its removal, and the action was commenced to recover against such third party. Here the party committing the act by which the mortgage security was lessened in value is made the party defendant, and the action is to recover from him the value of what he has taken away. The case falls within the principles laid down in *Van Pelt v. McGraw*, 4 N. Y. 110, in which the action was permitted to be maintained. Any other rule than this would permit the lands to be stripped of valuable timber, and even of the buildings, to the damage of the mortgagee. The buildings or timber frequently are the main part of the mortgage security; and, if twelve acres of timber could be cut and removed under the circumstances here stated, then the whole might be removed, or all the buildings removed, and the mortgagee would be without remedy. The bill upon which the injunction was allowed was dismissed as to defendant here without prejudice, and the defendant thereupon removed the timber cut. He must answer for its value.

Judgment affirmed.

The other justices concurred.

MORTGAGEE'S RIGHTS AND REMEDIES AGAINST IMPAIRMENT OF VALUE OF HIS SECURITY.—*Injunction*.—If a mortgagor in possession is about to remove buildings or fixtures from the mortgaged premises, or is about to cut, or threatens to cut, timber therefrom, or to commit other waste thereon, involving serious or irreparable injury to the land, and thus to render the security inadequate to pay the mortgage debt, the mortgagee is entitled to an injunction against such removal or waste without averring or proving the insolvency of the mortgagor: *Fairbank v. Cudworth*, 33 Wis. 358; *Bunker v. Locke*, 15 Wis. 635; *Scott v. Webster*, 50 Wis. 53; *Dorr v. Duderar*, 88 Ill. 107; *Nelson v. Pinegar*, 30 Ill. 473; *Adams v. Corriston*, 7 Minn. 456-464; *Emmons v. Hinderer*, 24 N. J. Eq. 39; *Brady v. Waldron*, 2 Johns. Ch. 148; *Verner v. Betz*, 46 N. J. Eq. 256; 19 Am. St. Rep. 387; *Cooper v. Davis*, 15 Conn. 556; *Coleman v. Smith*, 55 Ala. 369; *Knarr v. Conaway*, 42 Ind. 260. The rule as maintained in these cases is well stated in *Salmon v. Clagett*, 3 Bland, 125-180: "It is also well established that if

the mortgagor, who holds the possession, commits waste, or in any manner attempts to diminish the value of the property, or where it consists of personalty, is about to remove it beyond the reach of his creditor, so as to render it unequal to the discharge of the debt, or to place it so as not to be forthcoming for the satisfaction of the debt, he may be restrained by injunction, and an injunction for such a purpose may be obtained at any time before the debt becomes due, for otherwise a fraudulent mortgagor might at his pleasure deprive the creditor of all benefit from his mortgage." To the same effect is *Brady v. Waldron*, 2 Johns. Ch. 148. This doctrine has been invoked to prevent the mortgagor from removing buildings from the mortgaged premises, and thus impairing the security of the mortgagee: *Dorr v. Dudderar*, 88 Ill. 107; also to prevent him from removing machinery and other fixtures: *Taylor v. Collins*, 51 Wis. 123. And quite often to prevent him from cutting and removing timber from the mortgaged premises: *Bunker v. Locke*, 15 Wis. 635; *Fairbank v. Cudworth*, 33 Wis. 358; *Emmons v. Hinderer*, 24 N. J. Eq. 39. In *State Savings Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310, it was decided that as between the mortgagee and mortgagor a frame building erected by the side of a mill for use as an office in connection with the mill is part of the realty, although erected after the mortgage was given, intended to be temporary only, and to be ultimately removed, and not attached to the mill, nor fixed to the ground, but resting upon wooden blocks sitting upon the surface of the earth; and its removal may be enjoined without allegation and proof that such removal would work an irreparable injury to the land, and although the mortgagor who threatens to remove it is a person of undoubted solvency.

It is sufficient to show that there is no adequate remedy by action for damages. "There are inconveniences and perplexities to which one may be subjected by a trespass such as we are now considering for which a jury could not, under the rules of law, fully compensate him, and we think the provision of our statute broad enough, however the law may have been before its enactment, to authorize a resort to injunction in such cases": *State Savings Bank v. Kercheval*, 65 Mo. 682-689; 27 Am. Rep. 310.

In many cases it is held, however, that a mortgagor in possession cannot be enjoined from committing waste or removing buildings or fixtures from the mortgaged premises unless the acts complained of are shown to be such as to render the security insufficient for the satisfaction of the mortgage debt, or at least of doubtful sufficiency: *Moriarity v. Ashworth*, 43 Minn. 1; 19 Am. St. Rep. 203; *Buckout v. Swift*, 27 Cal. 434; 87 Am. Dec. 90; *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147; *Vanderslice v. Knapp*, 20 Kan. 647; *Coker v. Whitlock*, 54 Ala. 180; *Harris v. Bannon*, 78 Ky. 568. These cases all admit the rule that the mortgagor may be enjoined from committing waste or removing buildings or fixtures from the mortgaged premises in a proper case. They only add that to entitle the mortgagee to this remedy he must allege and prove that his security will be rendered insufficient or greatly impaired by such acts, otherwise a court of equity refuses to interfere.

A court of equity does not, unless under very special circumstances, grant an injunction when waste has been committed by the mortgagor in possession to prevent timber which has been cut from being removed. In ordinary cases the remedy by injunction applies only to stay or prevent future waste: *Watson v. Hunter*, 5 Johns. Ch. 169; 9 Am. Dec. 295. In an action to foreclose a mortgage, after judgment, and while awaiting confirma-

tion of the sale made in pursuance thereof, the court has authority on the petition of the purchaser to restrain the mortgagor from committing waste: *Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 568. On an application to restrain a mortgagor from cutting timber on a tract of mortgaged land which has been burnt over, if it is shown that the cutting of the burnt timber is to prevent it from rotting, and that cutting it is a permanent benefit to the land, the court will not enjoin the cutting, but will decree that the proceeds of the cut timber be applied on the mortgage debt: *Burk v. Getsinger*, 5 N. J. Eq. 391. If works for making brick have been constructed, and clay-beds opened on common property by tenants in common, then, as between a mortgagee of an undivided share or interest in the land and the cotenants in possession it is not waste for the latter to continue the business in the customary way, so as to entitle such mortgagee to an injunction restraining such use of the premises and the removal of the clay, thus suspending the business: *Russell v. Merchant's Bank*, 47 Minn. 286; 28 Am. St. Rep. 368.

Trespass for Waste or Removal of Fixtures.—In several of the states the doctrine prevails that after condition in the mortgage broken, the mortgagee may maintain trespass or trover to recover from the mortgagor in possession for the value of timber cut and removed, or for the value of buildings or fixtures removed from the mortgaged premises: *Page v. Robinson*, 10 Cush. 99; *Butler v. Page*, 7 Met. 40; 39 Am. Dec. 757; *Hapgood v. Blood*, 11 Gray, 400; *Pettengill v. Evans*, 5 N. H. 54; *Smith v. Moore*, 11 N. H. 55; *Stowell v. Pike*, 2 Me. 387; *Leavitt v. Eastman*, 77 Me. 117; *Langdon v. Paul*, 22 Vt. 205; *Harris v. Haynes*, 34 Vt. 220; *Hagar v. Brainerd*, 44 Vt. 294. The mortgagee may maintain trespass against the mortgagor or a stranger, who, under authority from the mortgagor in possession, removes a building erected on the land by the mortgagor after the execution of the mortgage: *Cole v. Stewart*, 11 Cush. 181; *Hagar v. Brainerd*, 44 Vt. 294. If there are two mortgages upon the land, and the mortgagor in possession, without the consent of the mortgagees, cuts timber upon the premises, after the first mortgage is discharged, the second mortgagee may maintain trespass for the cutting of the timber: *Sanders v. Reed*, 12 N. H. 558. If the mortgagee of a reversion of an estate in dower enters after condition broken he may maintain an action against the tenant for life to recover for waste committed before the breach of the condition in the mortgage: *Fay v. Brewer*, 3 Pick. 203. This right to maintain trespass against the mortgagor for injury to the mortgaged premises inures to the assignee of the mortgagee: *Linacott v. Weeks*, 72 Me. 506; and if the assignee of the mortgagor removes fixtures from the land, though erected by him after the execution of the mortgage, the assignee of the mortgagee may maintain an action of trespass against him for their value: *Smith v. Goodwin*, 2 Me. 173. A mortgagee of land may maintain an action of tort in the nature of trespass or trover against a third person who buys of the mortgagor in possession wood and timber wrongfully cut by the latter from the mortgaged land: *Searle v. Sawyer*, 127 Mass. 491; 34 Am. Rep. 425; *Atkinson v. Hewett*, 63 Wis. 396; *Gore v. Jenness*, 19 Me. 53; *Frothingham v. McKusick*, 24 Me. 403. The mortgagee may maintain an action in the nature of trover against a person whose servant unlawfully takes turf from the mortgaged land, and uses it in his master's business: *Wilbur v. Moulton*, 127 Mass. 509; and generally a mortgagee out of possession may maintain an action of trespass against a stranger for an injury to the mortgaged premises: *Leavitt v. Eastman*, 77 Me. 117; *James v. City of Worcester*, 141 Mass. 361. We apprehend the general rule to be that until condition broken in the mortgage, and a

forfeiture thereof, the mortgagee has no such property in timber cut, or fixtures removed from the mortgaged premises, as entitles him to maintain trespass or trover against the mortgagor or other person who removes such property: *Peterson v. Clark*, 15 Johns. 205; *Angier v. Agnew*, 98 Pa. St. 587; 42 Am. Rep. 624; *Pueblo etc. R. R. Co. v. Beshoar*, 8 Col. 32. Trespass by the mortgagee for removing a building from the mortgaged premises cannot be maintained unless the mortgagee can show a deficiency upon a regular and legal foreclosure and sale: *Taylor v. McConnell*, 53 Mich. 587; *Tomlinson v. Thompson*, 27 Kan. 70. The mortgagor is not liable in trespass or trover to the mortgagee for the value of timber, cut or removed after condition in the mortgage broken, if the mortgagor has a license, express or implied, to remove such timber: *Smith v. Moore*, 11 N. H. 55; *Page v. Robinson*, 10 Cush. 99; *Searle v. Sawyer*, 127 Mass. 491; 34 Am. Rep. 425; *Ingell v. Fay*, 112 Mass. 451. A mortgagor in possession may, either before or after condition in the mortgage broken, cut firewood and timber for repairs, for use on the premises, and for other ordinary uses according to well-known and existing usages of good husbandry, without being liable therefor in trespass to the mortgagee. It is only when the act of the mortgagor in cutting the timber is wrongful, and impairs the security of the mortgagee, that he is liable to him in trespass or trover: *Hapgood v. Blood*, 11 Gray, 400; *Wright v. Lake*, 30 Vt. 206; *Judkins v. Woodman*, 81 Me. 351.

Replevin.—In some jurisdictions the rule is maintained that the mortgagee may maintain replevin against the mortgagor in possession, or a purchaser from him with notice, actual or constructive, of the lien of the mortgage, for timber cut or fixtures or buildings removed from the mortgaged premises, whereby the mortgage security is impaired and its value diminished: *Waterman v. Matteson*, 4 R. L. 539; *Hoskin v. Woodward*, 45 Pa. St. 42; *Mosher v. Vehue*, 77 Me. 169; *In re Bruce*, 9 Ben. 236. If a house has been severed from the mortgaged premises without the consent of the mortgagee, he may maintain replevin against a stranger at any time before it becomes attached to and forms part of other realty, and if the building is again severed from such other realty to which it has attached before the mortgage is satisfied or discharged, the mortgagee may regain it by the action of replevin: *Dorr v. Dudderar*, 88 Ill. 107. In other jurisdictions, however, this doctrine is explicitly denied, and it is asserted that a mortgagee whose debt is due, but who has not entered into possession, cannot maintain replevin for a specific chattel or building which the mortgagor or his assigns have severed and removed from the realty, and which before severance was a fixture or part of the realty, and subject to the mortgage: *Kirchner v. Miller*, 39 N. J. Eq. 355; *Adams v. Corriston*, 7 Minn. 456; *Clark v. Reyburn*, 1 Kan. 281. These cases assume that the removal of fixtures, timber, or buildings from the mortgaged premises, while in the possession of the mortgagor, is one of the risks assumed by the mortgagee, and that, although his security is thereby impaired, his only remedy is by injunction to restrain such removal before the act is accomplished: *Kircher v. Schalk*, 39 N. J. L. 335-339; *Wilson v. Malby*, 59 N. Y. 126. When the mortgagor is entitled to possession after foreclosure, and until the expiration of the time for redemption, the purchaser at the foreclosure sale is not entitled to the possession of logs cut on the land after the sale, and cannot bring replevin for them: *Berthold v. Holman*, 12 Minn. 335; 93 Am. Dec. 233.

Damages for Impairment of Security.—That the mortgagee may maintain an action and recover damages against one, whether the mortgagor in pos-

session or a stranger who has injured the mortgaged property and impaired the security by a removal of fixtures or things of value therefrom, is decided in *Lavenson v. Standard Soap Co.*, 80 Cal. 245; 13 Am. St. Rep. 147, and the subject is treated at considerable length in a note appended to that case, at pages 153 to 156. Most of the cases cited in that note, as well as the principal case to which it is appended, maintain that before a mortgagee is entitled to bring an action against persons removing fixtures or things of value from the mortgaged premises, and before he is entitled to recover the damages occasioned thereby, he must first foreclose his mortgage, and ascertain that a deficiency remains due to him. Otherwise he cannot maintain the action: *Berthold v. Holman*, 12 Minn. 335; 93 Am. Dec. 234; *Kennery v. Burgess*, 38 Mo. 440; *Corbin v. Reed*, 43 Iowa, 459. But there is another line of decisions affirming that the mortgagee can maintain an action and recover damages against the mortgagor or a third person for substantial and permanent damage done by him to the mortgaged property, even though in its damaged state or condition it is of sufficient value to satisfy the mortgage debt: *Gooding v. Shea*, 103 Mass. 360; 4 Am. Rep. 563; *King v. Bangs*, 120 Mass. 514; *Tarbell v. Page*, 155 Mass. 256; *Byrom v. Chapin*, 113 Mass. 308; *Dorr v. Dudderar*, 88 Ill. 107; *Morgan v. Gilbert*, 2 Flap. 646; In *Byrom v. Chapin*, 113 Mass. 308, the court said: "This case must be governed by the decision in *Gooding v. Shea*, 103 Mass. 360; 4 Am. Rep. 563. The owner of the equity has no more right than a stranger to impair the security of the mortgagee by the removal of buildings or fixtures, thereby causing substantial and permanent injury and depreciation to the mortgaged estate. The right of action in such case is based upon the mortgagee's interest in the property, and the damages are measured by the extent of injury to that property: *Woodruff v. Halsey*, 8 Pick. 333; 19 Am. Dec. 329; *Page v. Robinson*, 10 Cush. 99. It does not depend upon, and the damages are not to be measured by, proof of insufficiency of the remaining security. The mortgagee is not obliged to accept what remains as satisfaction *pro tanto* of his debt at any valuation whatever. He is entitled to the full benefit of the entire mortgaged estate, for the full payment of his entire debt."

MULLEN v. CITY OF OWOSSO.

[100 MICHIGAN, 103.]

NEGLIGENCE—WHEN IMPUTED.—The negligence of the driver of a private conveyance in driving over an obstruction in the street is imputable to a person of the age of discretion who voluntarily rides with him, and prevents his recovery for the injuries received.

G. L. Keeler and J. T. McCurdy, for the appellant.

O. Chapman, for the respondent.

104 LONG, J. The plaintiff, a woman about thirty-four years of age, was riding with Mr. Pond in a private carriage drawn by one horse along a public street in the city of Owosso. Overtaking Mr. Sanders, who was driving in the same direction, Mr. Pond attempted to pass him. Sanders

was driving at a rapid rate, and Mr. Pond, in attempting to pass, started his horse rapidly forward. The parties raced for a distance, when Mr. Pond ran over a pile of sand in the highway. His carriage was overturned, and plaintiff thrown out and injured.

The proofs are clear that Mr. Pond knew that a building was being erected by the side of this street, and that a mortar-box and other materials were out in the street, in front of it. He stated that on a former trial he testified that he knew the street was encumbered by such materials, and thought that somebody was liable to get hurt there. Yet, in view of this knowledge, he carelessly drove his horse at the rate of more than six miles an hour in the street, contrary to the ordinances of the city. The court directed the jury: "If you find from the evidence in this case that the plaintiff would not have been injured but for the neglect of the city to give proper warning, then the plaintiff would be entitled to recover, unless you find that Mr. Pond knew of the obstruction to a portion of this street, ¹⁰⁵ and heedlessly drove over the obstruction, then he would be guilty of gross negligence, and plaintiff could not recover."

Again the court said: "If the plaintiff in this case voluntarily entered the private conveyance of Mr. Pond, and voluntarily trusted her person and safety in that conveyance to him, by voluntarily entering into the private conveyance of Mr. Pond, she adopted the conveyance, for the time being, as her own, and assumed the risk of the skill and care of the person guiding it. So, if you find that Mr. Pond was negligent in driving fast, . . . the plaintiff in this case could not recover."

The jury returned a verdict in favor of the defendant.

The only question presented by the brief of plaintiff's counsel is whether the negligence of Mr. Pond is imputable to the plaintiff. This question was settled in the affirmative in *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, which was decided by this court in 1872, and has not since been departed from. Counsel claim that some doubt has been cast upon this doctrine by some of the later decisions, and cite *Battishill v. Humphreys*, 64 Mich. 503. In that case a child three years of age was run over by an engine upon a railroad operated by defendants as receivers. The question was raised whether the negligence of the parents in permitting the child to go upon the track was imputable to the child.

Mr. Justice Morse held that such negligence was not imputable to the child. The other justices expressed no opinion upon that point. In *Shippy v. Village of Au Sable*, 85 Mich. 280, the question whether the negligence of the parents was imputable to a child three years of age was again presented; and, upon a full hearing, it was the unanimous opinion of the court that such negligence was not imputable to the child. Other cases of like character have been presented to this court, involving that question; and the rule ¹⁰⁶ is now established that, when the child brings the action for negligent injuries, the negligence of the parents cannot be imputed to it.

But the present case presents quite a different question. Here a person of the age of discretion voluntarily enters a private conveyance of another to ride, and by the carelessness of that person is injured. The rule laid down in the Miller case, cited above, precludes a recovery. It has been too long settled to be now disturbed. In *Schindler v. Milwaukee etc. Ry. Co.*, 87 Mich. 410, the rule was recognized. It was there said of the Miller case: "This is the general rule, and has been since followed in this state." The rule was also recognized by this court in *Cowan v. Muskegon Ry. Co.*, 84 Mich. 583.

Judgment is affirmed.

GRANT and MONTGOMERY, JJ., concurred with LONG, J.

HOOVER, J., dissented on the ground that, before the negligence of the driver of a vehicle or carriage of any sort can be imputed to a passenger or person riding in such vehicle, it must be shown that the driver is the agent of the passenger, or under his direction and control. Judge Hoover acknowledged that the case of *Thorogood v. Bryan*, 8 Com. B. 115, sustains the position taken in the majority opinion, but said that that case was disregarded in the subsequent case—*Rigby v. Hewitt*, 5 Ex. 240—and distinctly overruled in *The Bemina*, 12 Pro. Div. 58; *Mills v. Armstrong*, 13 App. Cas. 1-7; and *Little v. Hackett*, 116 U. S. 366. He contended that the great weight of authority establishes the rule that "in cases like the present the question becomes one of fact; the test of the passenger's responsibility for the negligence of the driver depending upon the passenger's control, or right of control, of the driver, so as to constitute the relation of master and servant between them," and cited the following cases in support of such rule: *Little v. Hackett*, 116 U. S. 366; *Missouri etc. Ry. Co. v. Texas Pac. Ry. Co.*, 41 Fed. Rep. 316; *Larkin v. Burlington etc. Ry. Co.*, 85 Iowa, 492; *New York etc. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161; 54 Am. Rep. 126; *Randolph v. O'Riordon*, 155 Mass. 331; *Galveston etc. Ry. Co. v. Kutac*, 72 Tex. 643; *Cahill v. Cincinnati Ry. Co.*, 92 Ky. 245; *Nesbit v. Town of Garner*, 75 Iowa, 314; 9 Am. St. Rep. 488; *Dean v. Pennsylvania R. R. Co.*, 129

Pa. St. 514; 15 Am. St. Rep. 733; *Masterson v. New York Cent. etc. R. R. Co.*, 84 N. Y. 247; 38 Am. Rep. 510; *Noyes v. Boscawen*, 64 N. H. 361; 10 Am. St. Rep. 410; *Follman v. City of Mankato*, 35 Minn. 522; 59 Am. Rep. 340; *Philadelphia etc. R. R. Co. v. Hogeland*, 66 Md. 149; 59 Am. Rep. 159; *State v. Boston etc. R. R. Co.*, 80 Me. 430; *Town of Knightstown v. Musgrove*, 116 Ind. 121; 9 Am. St. Rep. 827; *Chicago etc. R. R. Co. v. Spilker*, 134 Ind. 380. He denied that the question before the court had been settled or necessarily involved in the case of *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, and said: "I think it may be said that the question before us was not necessarily involved in the Miller case, and that it was not considered the controlling point. If it is to be treated as conclusive, against the overwhelming weight of authority in the United States and England, we shall apparently accept an incidental remark in an opinion as decisive upon an important principle, which deserved a full discussion before being settled. An examination will show that this decision has never since been applied beyond a recognition of the doctrine in cases where it was not involved in the decision. It was mentioned and recognized in *Cuddy v. Horn*, 46 Mich. 596; 41 Am. Rep. 178; but the court disposed of the case upon the ground that the passenger upon a yacht had no control of the management. In *Schindler v. Railway Co.*, 87 Mich. 411 the court again recognized the rule, saying that it was settled in *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, but that it did not apply, because the defendant was guilty of wantonness. The plaintiff was a child riding with a neighbor. Mr. Justice Champlin, in a concurring opinion, protested against the doctrine: 87 Mich. 416.

"In *Battishill v. Humphreys*, 64 Mich. 508, Mr. Justice Morse uses the following language: 'I am not content to let the question pass as a settled one in this state. At least I am not willing to assent to the proposition that the negligence of any other person can become the contributory negligence of a plaintiff without his fault.'

"In the case of *Shippy v. Village of Au Sable*, 85 Mich. 292, Mr. Justice Morse expressed satisfaction with the views in the Battishill case, and added: 'I am also satisfied that the greater weight of authority in this country is now opposed to the contention of the defendant.'

"In neither of these cases was the doctrine of *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, applied.

"It seems, therefore, that the authority of the case of *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, has been repeatedly questioned. The time has arrived when the question must be settled. I think it should be in conformity to the weight of authority and the better rule.

"The judgment should be reversed, and a new trial ordered.

"McGRATH, C. J., concurred with HOOKER, J."

NEGLIGENCE OF DRIVER OF VEHICLE, WHETHER IMPUTED TO PASSENGER.—The negligence of the driver of a wagon and team which collides with a railway train does not necessarily preclude a recovery by a person riding in the wagon with such negligent driver; but such person cannot recover in such a case unless it affirmatively appears that his own negligence did not proximately contribute to his injury: *Miller v. Louisville etc. Ry. Co.*, 128 Ind. 97; 25 Am. St. Rep. 416, and note.

SMITH v. MICHIGAN CENTRAL RAILROAD COMPANY.

[100 MICHIGAN, 148.]

CARRIERS OF LIVESTOCK — LIABILITY AS BAILEE. — A railroad company accepting livestock for transportation under a contract providing that it "is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner" thereby becomes a bailee for hire, and, having control of the cars in which the stock is shipped, is bound to furnish the shipper an opportunity to give the animals the care they may require in case the train is delayed.

CARRIERS OF LIVESTOCK — NEGLIGENCE — SUFFICIENCY OF PLEADING AND PROOF. — In an action by a shipper of livestock against a railroad company to recover the value of an animal lost a declaration which alleges both delay in the transportation and failure to furnish an opportunity for feeding and watering the stock justifies a recovery upon proof of omission on the part of the company to furnish an opportunity to the shipper to feed and water the stock, although the company is not liable for the delay.

NEGLIGENCE — SUFFICIENCY OF COMPLAINT. — If any negligent act of one party is charged which, in the conditions existing, results in loss to another, the latter is entitled to recover, although the declaration may charge other acts as negligent which are either not proven or which may not in law be negligent.

CARRIERS OF LIVESTOCK — CONSTRUCTION OF CONTRACT OF SHIPMENT. — A provision in a contract for the carriage of livestock that "the stock is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner, does not mean that the duty is to be performed by the shipper while the train is in motion and without being afforded an opportunity by the carrier to perform the duty. On the contrary the carrier must afford the shipper such opportunity if the train is delayed.

Hanchett, Stark & Hanchett, for the appellant.

F. E. Emerick, for the respondents.

150 MONTGOMERY, J. This is an action on the case. The declaration alleges that the defendant accepted from plaintiffs fifteen horses to be transported for hire and reward from Gaylord to Saginaw; that it became the duty of the defendant to take due and proper care of the same, and carry and convey the same with reasonable safety and dispatch, and to safely and securely, and without unnecessary delay, deliver the horses at the city of Saginaw; that defendant neglected its duty; that it left the car conveying the horses on the sidetrack of defendant's railway at West Bay City from 1 o'clock in the morning until 10 o'clock in the forenoon; that the said plaintiffs, on discovering that the defendant intended leaving the car standing on the said sidetrack for said length of time, requested the defendant to move the

car to a place in defendant's grounds, where the horses could be fed, watered, and cared for, and, if necessary, temporarily removed from said car; and that defendant refused and neglected to do so, or to permit said horses to be fed, watered, and cared for, or to feed, water, and care for said horses, or to allow said horses to be taken ¹⁵¹ out of said car, and, without cause or reason therefor, caused said car, with said horses therein, exposed and uncared for, to stand and remain said unreasonable period at said West Bay City.

The evidence adduced on the trial showed that the horses were shipped from Gaylord, after having been properly fed and cared for, on the 29th of April; that they were placed in the car in good condition; that the car was loaded at 9 o'clock in the morning, and, if the trains had been running on their regular time, would have reached Saginaw at 9 o'clock in the evening of the 29th. But the train to which the car was attached missed its connection at Grayling, so that it did not reach West Bay City until 1 o'clock A. M. of April 30th. It was there sidetracked, and remained at West Bay City until 12:35 P. M. of the 30th, when it was attached to a freight train, and taken to its destination, arriving at Saginaw at 1:55 P. M. The plaintiffs offered testimony tending to show that, upon the arrival of the car at West Bay City, John Welsh, an employee of the plaintiffs, in charge of the stock, went to the office of the yardmaster, and was told that the horses would be sent forward to Saginaw in about an hour; that, at the expiration of the hour, Mr. Welsh again inquired of the yardmaster, and was then informed that the car could not go out until the regular train, which left about 11 o'clock in the forenoon; that Welsh then told him that the horses had been in the car about twenty-four hours without food or water, and asked the yardmaster if there was any place he could feed and water them; that the yardmaster replied, "There is water down the track there," and Welsh replied that he could not carry the water and water them in the car, and requested the yardmaster to move them down to where the water was. The plaintiffs also offered testimony tending to show that there would not be room in the car for the man to get in to water the horses, and that there was no way of ¹⁵² watering and feeding them without taking them from the car; that there was no platform or chute at the place where the car was left upon which the horses could be removed from the car, although there was a platform with

inclined plank at the freight depot near by in the yard, for the purpose of unloading and loading horses.

The evidence showed that, at the time the cars were shipped, the contract was signed by the plaintiffs' agent, which provided that: "The said Michigan Central Railroad Company shall not be liable for any loss or damage which the shipper or owner of said livestock may suffer by reason of delay of trains, or by escape or loss of any stock from cars, or by reason of injuries to animals arising from the bruising or wounding themselves or each other, or from crowding in the cars, or from improper loading, or by reason of any loss or damage arising in the loading or unloading of said stock, or by reason of any other injuries or damage happening to said stock while in the cars of said company, except such as may arise from a collision of the train or the throwing of the cars from the track during transportation, and shall in no case be responsible for an amount exceeding one hundred dollars for each or any animal transported. Said stock is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner, and at his expense and risk. No liability of said company shall extend beyond its own line of road."

Plaintiffs also offered testimony tending to show that, because of the neglect and want of care, one of the horses died shortly after being received at Saginaw, and that sixteen dollars was paid to a physician for caring for the horses because of their condition, induced by the alleged negligence of the defendant. Under the instructions hereinafter referred to the plaintiffs recovered a verdict for one hundred dollars, the value of the horse that died, and for sixteen dollars, paid to a physician in caring for the injured animals.

The defendant brings error, and alleges: 1. That the declaration is defective, in that it does not correctly state ¹⁵² the relationship of the parties and the duties devolving upon the defendant from such relationship. We think the declaration sufficient. The contract relations between the parties were but material for the purpose of showing that the defendant became a bailee for the animals for hire. This is shown sufficiently by the declaration. The duty of the defendant resulting from the relation is stated somewhat broadly, but, in alleging negligence, the plaintiffs have proceeded with great particularity, and set forth the precise state of facts which they rely upon, and which are that, after the car had

reached West Bay City, the defendant neglected to furnish an opportunity for the plaintiffs to water and care for the horses, and neglected itself to provide this care. If the plaintiffs proved these facts, and proved that they were not themselves in fault, we think that, in any view of the relationship of the parties, the defendant is liable. It is not contended by the plaintiffs that the defendant is a common carrier, but it is insisted, and we think rightly, that the defendant, as a bailee for hire, having control of the car in which the horses were placed, was bound at least to furnish the plaintiffs an opportunity to give the animals the care which they required: See *American Merchants' Union Express Co. v. Phillips*, 29 Mich. 515.

It is also suggested that as the declaration charges both delay and failure to furnish opportunity for feeding and watering the horses, and, as neither alone would have caused the death of the horse, it becomes necessary for the plaintiffs, not only to prove both elements, but to show that defendant omitted to perform its duty to the plaintiffs in both particulars, and therefore, if there is no liability on the part of defendant for delay of trains, that one of the essential elements of the proximate cause cannot be charged against the defendant, and the case must fail. We cannot accept this reasoning. If any negligent act of ¹⁵⁴ defendant is charged which, in the conditions existing, was likely to and did result in loss to the plaintiffs, they are entitled to recover, and this though the declaration may have charged other acts as negligent which are either not proven or which may not in law be negligent. The gravamen of the charge is that, with the necessary retention of the horses in the car until their arrival at Saginaw, the defendant negligently refused to furnish any opportunity for the horses to be fed and watered, and this, under the charge of the court, the jury must have found was established by the testimony. The court charged the jury as follows:

"Mr. Welsh told us that, when the car arrived at West Bay City, he was of the opinion that the horses needed food and water. The plaintiffs claim that he made a request of the railroad company to place that car in such a position that he could water the horses. In view of the condition of affairs at West Bay City it must be deemed to be a request to take that car to a point where there was water, and where the horses could be unloaded in order to water them. If

that request was refused, or if the railroad company, instead of responding to the request, assured him that the cars would start out in a short period of time, so as to make watering and feeding unnecessary, and led him to believe by what they said to him that the train would start on, that he would not have to wait there any great length of time, and you find as a matter of fact, from the evidence in the case, that he made such a request of the company, and that they either refused or neglected or paid no attention to the request, and, in consequence of their refusal or neglect to accede to this request to place the car in a position where the horses might be taken out and cared for, fed, watered, and looked over by the agent in charge of them, and you also find that, in consequence, this particular horse—the gray horse—died in consequence of that horse not having food and water while the car was standing upon the track at West Bay City, and also in consequence of the car being detained or remaining on the track at West Bay City until 12:35 the same day, that those two events resulted in the horse becoming diseased, and, as a result of the disease, he died, the railway company ¹⁵⁵ would be responsible for the damage resulting to the plaintiffs in consequence of the horse's death. Therefore, it is a question of fact for the jury, and I confine it entirely to what occurred at Bay City. . . . If you find, as a matter of fact in this case, that a request was made by Mr. Welsh of the yardmaster, the proper party to look after a matter of this kind, or some one who was in his office, placed there by him to attend to matters during his absence, and that this request was not considered or acceded to, but he neglected to put that car in a position where the horses could be fed and watered that night, and you also find as a matter of fact that failing to do that, and also failing to transport the horses immediately or soon afterward to their destination, so that they might be fed and watered at their destination, but leaving the car without transporting it until 12:35 the following day, that the two, combined together, standing in the car upon the track, and the horses not being fed and watered, produced the disease that caused his death, then I think the railroad company would be liable, unless you find that the plaintiffs, by their own negligence, contributed to the injury—the disease of the horses.”

Under these instructions it is clear that the jury must have found that the failure to water and feed the horses was

the occasion of the disease, resulting in death, in the sense that but for the failure to water the horses the injury would not have occurred. The fact that the circuit judge associated with this the attendant circumstances, and treated the attendant circumstances as a part of the cause, wrought no injury to the defendant, and was not only not error, but, we think, proper. It is clear that failure to water the horses at starting would not be negligence on the part of the railroad company, nor, if the entire time consumed in their transportation were only two hours, would any one contend that failure to furnish an opportunity for watering would constitute negligence on the part of the railroad company. But the negligence in failure to permit an opportunity to water the horses is shown in view of the fact that the horses had been seventeen ¹⁵⁶ hours on the road when the request was preferred, and were subsequently detained for several hours thereafter.

The defendant requested the court to charge the jury that the defendant was not legally bound in any way to care for the horses while in transit, and the request for assistance claimed to have been made by Mr. Welsh to the yardmaster at West Bay City could not shift the duty to care for the stock on the defendant. We think the request was properly refused. The evidence tended to show that, without having afforded an opportunity for unloading the horses, they could not be fed, watered, and cared for. The provision in the contract that "the stock is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner," does not mean that the duty is to be performed by the shipper while the train is in motion, and without being afforded an opportunity by the company to perform the duty. If the provision should be given any force it creates a very fair inference that the company will afford the shipper the opportunity to perform the duty which it has seen fit to provide shall rest upon him.

It is also contended that the plaintiffs' testimony failed to show due care on the part of Welsh to care for the horses, and that the horses might have been unloaded without moving the car. But we think these questions were fairly questions for the jury, and properly submitted.

An examination of the record convinces us that there was no error to the prejudice of the defendant, and the judgment will be affirmed, with costs.

The other justices concurred.

CARRIERS OF LIVESTOCK—DUTY TO FEED AND WATER.—A railway company carrying livestock must provide suitable places where they can be fed and watered in every kind of weather, without injury, so far as this can be done by the use of proper care, and for a failure to perform this duty it must respond in damages: *International etc. Ry. Co. v. McRae*, 82 Tex. 614; 27 Am. St. Rep. 926, and note. Where it is found that cattle, being transported in a railroad car with hogs, are suffering the conductor of the train is not justified in refusing, upon the shipper's request, to lay out the car at a station merely because the stockpen at that place is unsafe for hogs, it not appearing that the cattle could not be separately unloaded, or that the company was under no duty of having a pen safe for hogs: *Johnson v. Alabama etc. Ry. Co.*, 69 Miss. 191; 30 Am. St. Rep. 534, and note. See, also, the extended note to *Clark v. Rochester etc. R. R. Co.*, 67 Am. Dec. 208-217.

NEGLIGENCE.—SUFFICIENCY OF COMPLAINT: See the note to *Madden v. Port Royal etc. Ry. Co.*, 28 Am. St. Rep. 858, where the cases are collected.

CLUETT v. ROSENTHAL.

[100 MICHIGAN, 193.]

FRAUDULENT CONVEYANCES.—CHATTEL MORTGAGE, authorizing the mortgagee to take possession forthwith, and, in addition to the usual power of sale upon default, authorizing the mortgagee to sell at private sale or in the usual course of trade, does not vest any actual title in the mortgagee, and is not inconsistent with the rights of the mortgagors or their creditors who may acquire liens to redeem at any time. Hence such mortgage is not void as a general assignment with preferences.

GARNISHMENT—WAIVER.—A garnishee defendant waives his right to have the case tried as against him at the term at which judgment is rendered against the principal defendants, by noticing the case for a subsequent term, and in that term consenting that it be continued. The case must thereafter proceed as other issues of fact, subject to notice by either party.

EVIDENCE.—BOOKS OF ACCOUNT of a partnership which has executed a chattel mortgage on its goods in trust to secure an alleged indebtedness to the mortgagee and others are admissible in evidence as tending to show the *mala fides* of the transaction, if they tend to prove that part of the alleged indebtedness never in fact existed, and that the mortgagee was so familiar with the business of the mortgagors as to support the inference that he had examined the books.

EVIDENCE IMPROPERLY OBTAINED — CONTENTS OF ACCOUNT-BOOKS.—The fact that knowledge of the contents of account-books was obtained by a witness while they were in the hands of a sheriff under an authorized attachment does not render his testimony as to such contents incompetent if, at the time such knowledge was obtained, he was not acting for the person who seeks to introduce such evidence.

EVIDENCE OBTAINED BY TORT.—One who is in no way responsible for a tort by which information is obtained may introduce evidence of the facts so ascertained, although trespass has been committed by the witness in obtaining the information.

EVIDENCE OBTAINED BY TORT.—Courts do not pause in the trial of a case to open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining information possessed by a witness.

JURY TRIAL—ERRONEOUS CONDUCT OF COUNSEL IN ARGUMENT.—Language used by counsel which evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, is ground for the reversal of the verdict and judgment.

GARNISHMENT. The mortgage involved in this case authorized the mortgagee to take possession forthwith, and in addition to a power of sale upon default, provided that “if, however, said second party shall deem it more advantageous to sell said property, or any part thereof at private sale or in the usual course of trade, he is hereby expressly authorized to make such private sale, or to sell in the usual course of trade, retaining and applying the proceeds to the liquidation of the indebtedness hereby secured, as hereinbefore mentioned.”

Bunker & Carpenter, for the appellant.

Brown & Lovelace, for the respondents.

195 MONTGOMERY, J. On the twenty-fifth day of June, 1892, the principal defendants, Sol and Sam Rosenthal, executed to the garnishee defendant, Gates L. Rosenthal, a trust mortgage to secure fifteen thousand eight hundred dollars of alleged indebtedness of the mortgagors, which consisted of eighteen hundred and fifty dollars to the Union National Bank, nine thousand dollars to Gates L. Rosenthal, two thousand nine hundred and fifty dollars to Rosen Brothers, and two thousand dollars to Ben Kersberg, of Kansas City. The mortgage covered the entire stock of Rosenthal Brothers, together with their books of account, credits, evidences of debt, rights of action, and bills and accounts receivable. The defendant took possession under the mortgage very shortly after its execution. This suit in garnishment was instituted for the purpose of attacking the validity of the mortgage. It is claimed: 1. That it amounted to a general assignment with preferences; and 2. That it was actually fraudulent as against the creditors of Rosenthal Brothers.

We do not find support for the first contention. The only provision of the chattel mortgage which is unusual is that authorizing the mortgagee to sell at private sale or in the usual course of trade. This does not vest any actual title

in the mortgagee, and is not inconsistent with the right of the mortgagors, or their creditors who may acquire ¹⁹⁶ liens, to redeem at any time. The provision confers no power upon the mortgagee to reinvest the proceeds of the sales, or apply them to any other purpose than the satisfaction of the secured claims. The case is not at all analogous to *Kendall v. Bishop*, 76 Mich. 634. In that case the mortgagee was empowered to reinvest the trust funds, and add to the stock.

The court below was of opinion that the mortgage was not void upon its face, and submitted the question of fraud to the jury. The trial resulted in a verdict for the plaintiffs. The questions presented by the appellant's counsel relate to proceedings at the trial. We do not think the court erred in proceeding to a trial of the case. The defendant waived his right to have the case tried at the term at which judgment was rendered against the principal defendants by noticing the case for a subsequent term, and, in that term, consented that the case be continued. Having waived the statutory right, the case must thereafter proceed as other issues of fact, subject to notice by either party.

Error is assigned upon a ruling of the circuit judge admitting proofs of the contents of the books of Rosenthal Brothers. Two grounds are urged against the admissibility of the testimony offered: 1. That the original books themselves were mere hearsay, in a suit against Gates L. Rosenthal; and 2. That the secondary evidence admitted was improperly obtained, and therefore it should have been excluded. As to the admissibility of the books themselves, we think the court was not in error. The testimony tended to show that defendant had previously been connected with Rosenthal Brothers, and severed his connection with them in 1890; that between the first day of January, 1892, and the first day of June Rosenthal Brothers had purchased very largely, their purchases amounting to eighteen thousand dollars; that defendant had, after severing his connection ¹⁹⁷ with the firm, kept some track of the business; that when he took the mortgage in June, 1892, as trustee, he went through the form of taking possession, but continued Rosenthal Brothers in actual charge of the business; that the stock was subsequently sold by the mortgagee, and bid in by him in form, but that Rosenthal Brothers still continued in actual possession; that in taking the mortgage he assumed to act as trustee for certain named creditors, who it does not appear were present;

and the jury might well have found that he would, as a reasonably prudent man, before assuming to act as trustee, inform himself as to the state of these creditors' claims by reference to the books of Rosenthal Brothers, especially in view of his previous knowledge of their business. The books in fact tended to show that no such indebtedness as that claimed to exist in favor of Rosen Brothers and Kersberg was ever created. This testimony was certainly competent as showing a fraudulent intent on the part of Rosenthal Brothers: *Koch v. Lyon*, 82 Mich. 513. And we think, in view of the fact that the defendant undertook to act as trustee for other alleged creditors, it is a fair inference that he would inform himself by reference to the books as to the state of their claims, and the books were some evidence of *mala fides* on his part: See *Loos v. Wilkinson*, 110 N. Y. 212. See, also, *Ganther v. Jenks*, 76 Mich. 510.

The information of the witness who gave evidence of the contents of the books was obtained while the books were in possession of the sheriff under an unauthorized attachment; and in *Rosenthal v. Circuit Judge*, 98 Mich. 208, 39 Am. St. Rep. 535, we held that the attorney should be required to deliver up any memorandum which he had made, relating to the contents of the books, thus righting a wrong committed by a misuse of the process of the court, as far as practicable. But the attorney who obtained the information was not acting in the present case at the time the ¹⁹⁸ attachment in question was sued out or the information obtained. The question, therefore, is whether one who is in no way responsible for the tort by which the information was obtained by a witness may introduce evidence of the facts ascertained, even though a trespass or wrong was committed by the witness in obtaining the information. We think such testimony is admissible. It is not the policy of the courts, nor is it practicable, to pause in the trial of a cause, and open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining the information which a witness possesses. The cases have gone to great length upon this subject. In *Legatt v. Tollervey*, 14 East, 302, it was held that, upon the offer to prove at the trial of a cause the original record of an indictment and acquittal, or a true copy thereof, such evidence must be received, though there was no order of court or fiat of the attorney general allowing the plaintiff a copy of such record, and though the

officer who, without such authority, produced the record, or gave a copy of it to the party, is answerable for contempt of court in so doing. This has become a leading case, and is cited in 1 Greenleaf on Evidence, section 254 a, in support of the doctrine of the text that, though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue; that the court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it frame an issue to determine that question. The doctrine is also fully supported by *State v. Mathers*, 64 Vt. 101; 33 Am. St. Rep. 921; *Commonwealth v. Dana*, 2 Met. 329; *Commonwealth v. Tibbets*, 157 Mass. 519.

One other assignment of error remains to be noticed. In the closing address to the jury counsel for plaintiffs used the following language: ¹⁹⁹ "These men of Jerusalem, that have got the evidence in their possession as to the truth or falsity of this claim, their mouths are sealed, and a padlock upon each one."

Counsel for defendant interposed, saying: "We take an exception to the statement of counsel. There is nothing in this case to show any such thing."

Plaintiffs' counsel replied: "I presume very likely that you deny your nationality. I have n't any doubt of it."

"*The Court.* I don't think that you should have used that language at all."

"*Plaintiffs' Counsel.* Men from Jerusalem?"

"*The Court.* I don't think you should have used it."

"*Plaintiffs' Counsel.* Take it back then. Suppose they came from Podunk instead of Jerusalem. I don't care where they came from."

Further on, plaintiffs' counsel proceeded: "I would like to have before you the conversation between the Rosenthals, Gates L. Rosenthal, Rosen Brothers, and the men that drew the mortgage in this case. . . . You know how they do it. They attempt to fail, put the property in somebody else's possession, in somebody else's name, and then they go to a creditor and say: 'Will you take twenty-five cents on the dollar? Twenty-five cents we will give you. That is right. Just so fine, you know; just so slick as the paper on the wall."

Take your twenty-five cents on the dollar.' That is the way they do it—so fine, so slick [caricaturing the speech and gestures of Jews]."

And, further on: "Did you ever know any of these kind of fellows that was a laboring man, in your life? I want you to think about that. I ask you if you ever saw one of these fellows in your life that was shoveling sand upon the railroad."

And, further on: "I want to put it into your memories, gentlemen of the jury—I want to know if you ever met a man of that kind in your life that was a laboring man. Go back over your past life, and every place you have lived in your life, ²⁰⁰ and call to mind if you can name a man of that stamp that was ever a laboring man. Forty years of my life have gone, and I have n't discovered that one yet. Maybe you have. You don't find them doing that kind of business. They are putting up games and schemes—just so nice as the paper on the wall; that is what they are doing [caricaturing the speech and gestures of Jews].

"*Counsel for Defendant.* We take an exception to the line of argument.

"*Plaintiffs' Counsel* (proceeding). And they are doing it all over this country, and have been doing it."

When it is considered that the defendant was not even a witness on his own behalf, and that neither of the Rosenthal Brothers were sworn, it is apparent that the only purpose of this line of argument was to impress the jury with the belief that the nationality of the defendants should be taken as evidence against them. This is certainly not the policy of the law. The courts are open to aliens and citizens alike; and any attempt, by arousing the prejudice of jurors, to curtail this right, is a departure from the proper privilege of counsel, and, when carried to the extent indicated by the language quoted, is sufficient to justify a reversal of the case. It is unnecessary to cite cases decided by this court in which the privilege of counsel in arguing cases has been considered. It is enough to say that the court will not regard captious objections to arguments, and will allow something for the zeal of counsel, and will hesitate in any case to consider that counsel have intentionally transgressed the rule. But where the language is such as evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, we cannot overlook it, or consider that a party against whom

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such effort has been made has had a fair consideration of his case at the hands of the jury.

We think, for this reason, the case should be reversed, and a new trial ordered.

The other justices concurred.

CHATTEL MORTGAGES—FRAUDULENT CONVEYANCES—POWER OF SALE BY MORTGAGEE.—A chattel mortgage given to secure a *bona fide* debt, and authorizing the mortgagee to sell the goods and apply the proceeds to the extinguishment of the debt, is valid as against the other creditors of the mortgagor: *Benham v. Ham*, 5 Wash. 128; 34 Am. St. Rep. 851, and note. See, also, the extended note to *Wygal v. Bigelow*, 16 Am. St. Rep. 499.

EVIDENCE—BOOKS OF ACCOUNT.—An account-book fair on its face, and shown to have been kept in the ordinary course of business, is admissible in evidence even in favor of the party by whom it was kept: *Anchor Milling Co. v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600, and note, with the cases collected. See, also, *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307, and the extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

EVIDENCE IMPROPERLY PROCURED.—When papers are offered in evidence the court can take no notice of how they were obtained, whether legally or illegally, properly or improperly, nor will it form a collateral issue to try that question: *State v. Mathers*, 64 Vt. 101; 33 Am. St. Rep. 921.

APPEAL—IMPROPER ARGUMENT TO JURY—REVERSIBLE ERROR.—It is error to permit counsel, in arguing before the jury, to state and comment upon facts not in evidence against the objection of the opposite party: *Cross v. Grant*, 62 N. H. 675; 13 Am. St. Rep. 607. This question is fully discussed in the extended note to *McDonald v. People*, 9 Am. St. Rep. 559. See, also, *Monmouth Mining etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187.

LYONS v. YEREX.

[100 MICHIGAN, 214.]

ESTATES—RIGHT OF WIDOW TO SHARE IN PERSONAL PROPERTY OF HUSBAND.—Under the Michigan statute a widow takes a share of the personal property of her husband as distributee, and not as dowress, and is an heir as to such property.

INSURANCE—BENEFIT ASSOCIATIONS—POLICY PAYABLE TO HEIRS—RIGHTS OF WIDOW.—If a member of a mutual benefit life insurance company dies intestate, and his insurance policy is made payable to his "heirs at law," his widow is entitled to share in the proceeds of the policy.

W. E. Brown and Cahill & Ostrander, for the appellant.

Geer & Williams, for the respondent.

215 McGRATH, C. J. On the thirtieth day of September, 1887, there was issued to Harrison H. Lyons a certificate of membership in the Northwestern Masonic Aid Association,

a mutual benefit or co-operative insurance company, which was made payable "to the heirs at law of the said Harrison H. Lyons." The insured died intestate, leaving a widow and one son. By agreement the money was paid over to defendant, who paid one-half thereof to plaintiff, who now sues to recover the balance, claiming that the widow is not entitled to share in the proceeds of the policy.

Under our statute the widow takes a share of the personal property of her husband as distributee, and not as dowress, and is an heir as to such property. In *Hascall v. Cox*, 49 Mich. 435, 440, it is said: "'Heirs' is a technical word, and when it is made use of in any legal instrument there is a presumption more or less strong, according to the circumstances, that it is employed in a technical sense. . . . But in common speech the word is frequently used to indicate those who come in any manner to the ownership of any property by reason of the death of an owner, and may then include next of kin and legatees as well as those who take by descent. And in wills, which are often very informal instruments, and drawn without legal assistance, the word is sometimes employed with quite as little regard to the technical sense."

In the present case we are not considering the use of the word in a will, but in a contract of insurance, in which the insured has used the word to designate the beneficiaries. In determining the signification of words used in any case we are to consider all the surrounding circumstances. The original purpose of such contracts on the part of the insured is to make provision for dependents. It is most probable that the insured was actuated by the motive which ordinarily prompts men to take out ²¹⁶ insurance. The common acceptance of the term "heir" has already been referred to. The statute makes the widow an heir as to personal property, and the wife is within the class of persons protected and sought to be protected by this class of insurance.

In *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1, cited by plaintiff, the court was construing a will in which the testatrix was dealing with both real and personal property, and the court held that the word "heirs" was used to designate blood relations.

In *Griswold v. Sawyer*, 125 N. Y. 411, it was held that the term "legal representatives," as used in a life insurance policy, includes the widow. The opinion was written by the

same justice who wrote *Tillman v. Davis*, 95 N. Y. 17; 47 Am. Rep. 1. The court say: "Mr. Griswold was not a lawyer, and hence cannot be supposed to have used these words in their strict, technical, legal sense, but it is reasonable to suppose that he used them in the general sense in which they are frequently used and generally understood by laymen."

In *Kaiser v. Kaiser*, 13 Daly, 522, it was held that the words "legal heirs," used in a certificate of membership in a mutual insurance association, include the widow. Bookstaver, J., says: "We think all this entirely inconsistent with the theory that he used the phrase 'legal heirs' in its ordinary acceptation, but we think that he intended thereby to designate his wife and children, if he should leave any; and this is the meaning often attached to the phrase by the unlearned, especially when only personal property is concerned."

Gauch v. St. Louis etc. Ins. Co., 88 Ill. 251; 30 Am. Rep. 554, is also cited, but the court there held that under the statute the widow did not take an interest in her husband's personal property as a distributee, but as dowress.

In *Lawwill v. Lawwill*, 29 Ill. App. 643, decedent held ²¹⁷ a policy in the Masonic Benevolent Association payable to his legal heirs. He died, leaving a widow, but no children. The statute provided that, in case the husband died without issue, the widow should take all the personal property. The court held that the widow was within the contingencies specified in the statute, and was the heir at law to his estate, and that the word "heirs," when uncontrolled by the context, must be construed to mean the persons designated by the statute as such in case of intestacy: See, also, *Covenant etc. Assn. v. Hoffman*, 110 Ill. 603, and *Alexander v. Northwestern etc. Assn.*, 126 Ill. 558.

In *Johnson v. Knights of Honor*, 53 Ark. 255, 260, Battle, J., says: "Suffice it to say that the weight of authority holds that the word 'heirs,' when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain, it, means those who would, under the statute of distribution, be entitled to the personal estate of the persons of whom they are mentioned as heirs, in the event of death and intestacy. . . . In many states where the widow is entitled to take under the statute of distribution she is held to be an heir of deceased husband as to his personal estate, but it is dif-

ferent in this state. . . . It is true that section 2592 of Mansfield's Digest provides: 'If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which such husband died seised, and one-half of the personal estate, absolutely and in her own right.' But she takes the one-half of the personal estate as dower, absolutely and independently of creditors, and not as a distributive share."

In *Bailey v. Bailey*, 25 Mich. 185; *Barnett v. Powers*, 40 Mich. 317; *Richardson v. Martin*, 55 N. H. 45; *Ivins' Appeal*, 106 Pa. St. 176; 51 Am. Rep. 516; *Luce v. Dunham*, 69 N. Y. 36; *Dodge's Appeal*, 106 Pa. St. 216; 51 Am. Rep. 519, the property with reference to which the word was used was real estate. In the last-mentioned case, Sterrett, J., in the opinion, says: ²¹⁸ "If the fund for distribution were personalty the widow would perhaps be entitled to participate therein."

In *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, the property devised was both real and personal. The court say: "On the face of the will it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both properties go together."

Niblack on Mutual Benefit Societies, section 247, says: "At common law one's heirs are the persons who would inherit his real estate by right of blood. The statutes of adoption and those of descent have, in every state, to a greater or less degree, enlarged the meaning of the word, so that it may include persons not of the blood of the intestate. At common law the word had no reference to the distribution of any personalty, and this rule has not been disturbed by statute in some states. In those states, therefore, where this common-law rule obtains, the word 'heirs,' in a statute setting forth a class of persons who may take the fund, or in a certificate designating the persons who shall take the fund on the member's death, must be taken to mean the person or persons to whom the real estate of the member will pass under the statutes of descent, whether such person or persons be akin to him or not. In most states, however, the statutes provide not only who shall inherit the realty of an intestate, but also who shall be the heirs of his personal property."

The same author, at section 248, says: "Nothing is more natural, therefore, than to regard the heirs of the intestate's personal property as the beneficiaries designated in the con-

tract of insurance as 'my heirs': See *Houghton v. Kendall*, 7 Allen, 72; *White v. Stanfield*, 146 Mass. 424; *Addison v. New England etc. Assn.*, 144 Mass. 591; *Collier v. Collier*, 3 Ohio St. 369; *Eby's Appeal*, 84 Pa. St. 241; *Freeman v. Knight*, 2 Ired. Eq. 72; *Kentucky etc. Ins. Co. v. Miller*, 13 Bush, 489; *Wilburn v. Wilburn*, 83 Ind. 219 55; *Gosling v. Caldwell*, 1 Lea, 454; 27 Am. Rep. 774; *Ward v. Saunders*, 3 Sneed, 387; *Croom v. Herring*, 4 Hawks, 393.

Under the circumstances, we think it must be presumed that by the use of the words "my heirs" the insured intended to include those designated by the statute as such, and to whom the law would give that class of property in case of intestacy.

The judgment must therefore be affirmed.

GRANT, MONTGOMERY, and HOOKER, JJ., concurred.

LONG, J., did not sit. —

HUSBAND AND WIFE AS HEIRS ONE TO THE OTHER.—Neither husband nor wife is heir to the other; the interest which one has in the estate of the other exists by virtue of the marital relation, rather than as heir to the decedent: See the extended note to *In re Ingram*, 12 Am. St. Rep. 83, and *In re Estate of Dobbell*, 104 Cal. 432; *ante*, p. 123.

WOLCOTT v. PATTERSON.

[100 MICHIGAN, 227.]

MARRIED WOMEN—POWER TO CONTRACT—ATTORNEY'S SERVICES IN DIVORCE SUIT.—A married woman may, by contract, make herself chargeable with the value of services rendered by an attorney upon her employment to secure a divorce from her husband, and the husband is not liable for such services unless made so by order of court.

MARRIED WOMEN—LIABILITY FOR EXPENSES OF DIVORCE PROCEEDING.—

A statute providing that in divorce proceedings "the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit," including costs, and may award execution therefor or direct such sums "to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver," clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her therefrom by an order for expense money to be paid by her husband.

J. D. Conely, for the appellant.

M. S. Wolcott, for the respondent.

228 MONTGOMERY, J. Plaintiff is an attorney at law, and recovered in the court below for professional services rendered

to the defendant, who is a married woman. A portion of the services related to the separate estate of the defendant, who is shown in the record to have had considerable property in her own right. Included in the bill of particulars was a charge of one hundred dollars for retainer and services in a divorce suit brought by defendant against her husband. This proceeding was not carried through to a termination, but was discontinued by Mrs. Patterson before a decree.

Substantially the only question presented by the record is whether a married woman may, in this state, make herself chargeable with the value of services rendered by an attorney upon her employment to secure a divorce from her husband. It is contended by the defendant that the husband is liable for such services, and that the wife is not. The authorities are not uniform upon the question, but we think the weight of authority negatives such liability on the part of the husband: See Schouler on Husband and Wife, sec. 104, and cases cited in note. In some of the states the liability of the husband is asserted (*Sprayberry v. Merk*, 30 Ga. 81; 76 Am. Dec. 637; *Porter v. Briggs*, 38 Iowa, 166; 18 Am. Rep. 27; *Langbein v. Schneider*, 27 Abb. N. Cas. 228; 16 N. Y. Supp. 943), and in these jurisdictions it is held that the wife is not competent to charge herself with such expenses: *Musick v. Dodson*, 76 Mo. 624; 43 Am. Rep. 780; *Cook v. Walton*, 38 Ind. 228; *Whipple v. Giles*, 55 N. H. 139. See, however, dissenting opinion of Pettit, C. J., in *Putnam v. Tennyson*, 50 Ind. 456, 461. We think ²²⁹ the cases which deny the husband's liability are more consonant with the holdings of this court that one who supplies the wife with goods apparently suitable to her situation in life does so at his peril, and can only recover if the husband has failed to supply necessities: *Clark v. Coz*, 32 Mich. 204.

Is the wife competent to contract for such services? The wife may exhibit her bill for divorce in her own name: Howell's Stat., sec. 6233. And by section 6235 it is provided that "In every suit brought, either for divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency, and it may decree costs against either party, and award execution for the same, or it may direct such costs to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver."

The statute clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her of such cost by an order for expense money to be paid by her husband: *Ross v. Ross*, 47 Mich. 185. It has also been held in this state that a married woman is competent to assert her rights either as plaintiff or defendant, and, where a suit is brought against her as defendant, is bound to do so: *Wilson v. Coolidge*, 42 Mich. 112. It would seem to follow logically that, having the power to bring suit, and being in such suit responsible for costs, she must be held competent to contract for the services of an attorney to represent her rights. We think the right to contract for such services is necessarily incident to and included in her right to bring suit.

In this view there was no error committed to the prejudice of the defendant, and the judgment should be affirmed, with costs.

The other justices concurred.

MARRIAGE AND DIVORCE—LIABILITY OF HUSBAND FOR WIFE'S ATTORNEY'S FEES IN ACTION FOR DIVORCE.—An attorney cannot recover, as against the husband, for legal services rendered the wife in a contemplated suit for divorce on the ground of his cruelty, for the reason that prosecuting or defending a suit for divorce has no relation to her protection as a wife: *Kincheloe v. Merriman*, 54 Ark. 557; 28 Am. St. Rep. 60, and note, with the cases collected.

COULTER v. NORTON.

[100 MICHIGAN, 339.]

LANDLORD AND TENANT—COVENANTS—RIGHTS OF TENANT—EVICTION.—

Under a sublease of a cigar and news room in a hotel, with the appurtenances thereto, and the right of entrance to and from the hotel rooms, together with the entire cigar privilege of the hotel, the tenant is entitled to have the hotel kept open without reference to an implied covenant for quiet enjoyment. The abandonment of the lower floor of the hotel and the use of a portion only of the upper floors for sleeping-rooms in connection with a hotel across the street constitutes an eviction of such tenant.

LANDLORD AND TENANT—ASSIGNMENT OF LEASE—EVICTION—LIABILITY OF ASSIGNEE.—An assignee of a lease, to whom a subtenant attorns, is liable for the eviction of such tenant, accomplished by such assignee's acts.

LANDLORD AND TENANT—EVICTION.—MEASURE OF DAMAGES for the eviction of a tenant is the actual value of the unexpired term, less the rent reserved.

Wilson & Cobb, for the appellants.

Barkworth & Blair, for the respondent.

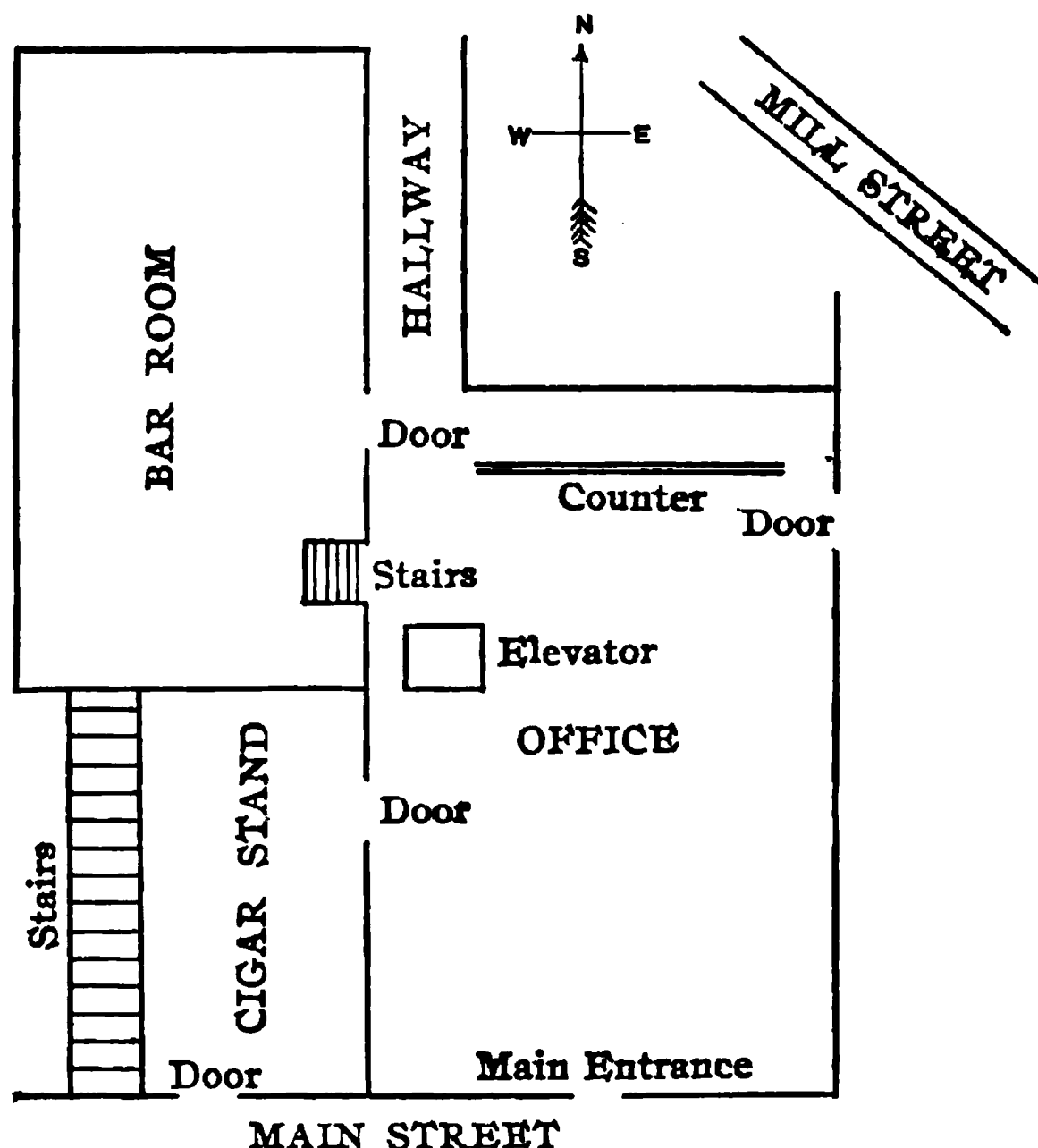
390 MONTGOMERY, J. In December, 1891, Norton, Griffith & Co. were lessees of the Hurd House property at Jackson, and were making extensive alterations and improvements preparatory to reopening the hotel. The improvements were completed about February 10, 1892, and the house opened for business. In December, 1891, said lessees sublet to plaintiff "the cigar and news room and stand in the hotel building now known as the 'New Hurd,' being the first room immediately west of the main entrance to said hotel, and the appurtenances thereto, and the right of entrance to and from the hotel rooms, for the purpose of carrying on said business of cigar-selling and news-dealing, for the term of five years; said term to commence as soon as said hotel building and said room are 391 ready for occupancy, and said hotel is in actual occupancy and operation." The lease contained the further provision that "the said parties of the first part grant herewith the entire cigar privilege of the New Hurd to said second party, and agree to and with the said second party that they will sell no cigars in said hotel, or the bar connected therewith, excepting those bought of the said second party, for which they shall pay said second party at the rate of eighty-three dollars per thousand, said cigars to be of a quality selling at wholesale at regular market price of not less than fifty-five dollars per thousand; . . . and the said second party does hereby covenant and promise . . . that he will at his own expense, during the continuance of this lease, keep the said premises, and every part thereof, in as good repair, and, at the expiration of the term, yield and deliver up the same in like condition, as when taken, reasonable use and wear thereof and damage by the elements excepted."

There are no other covenants in the lease which are material. A sketch of the premises is given on next page.

After the making of this lease, Norton and Hayden, the defendants, became owners of the general lease of the Hurd House, and landlords of plaintiff. In November, 1892, the hotel proprietors, finding the business unprofitable, abandoned this floor, and used the upstairs portion for sleeping-rooms in connection with another hotel across the street. Plaintiff thereupon abandoned the premises leased by him,

and brings suit for damages, claiming a constructive eviction, and an implied covenant to maintain the hotel.

1. It is claimed that this case falls within section 5655 of Howell's Statutes, which provides that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not." We think this objection without force. The question here is, What was leased? and we think the answer to this question very clear. There is no obscurity or uncertainty in the terms ³⁹² of the lease. It is the cigar and news room in the New Hurd House, the appurtenances thereto, and the right of entrance to and from the hotel rooms; also, the entire cigar privilege of the New Hurd. There can be no doubt that, on the one hand, the plaintiff understood that he was getting the room with the door opening into the Hurd Hotel office, and was to have



the cigar privilege with the door opening into the hotel, nor, on the other hand, that the lessors understood that they were leasing the same thing: *Denison v. Ford*, 7 Daly, 384. It is not a case of implied covenant. There was an express covenant for the peaceable and quiet enjoyment of the thing leased.

2. Nor do we think there can be any doubt that the closing of the hotel was such an interference in the use ³⁹³ of the premises as to amount to an eviction: *Wood on Landlord and Tenant*, 2d ed., 1101; *Rhodes v. Bullard*, 7 East, 116; 3 *Sutherland on Damages*, 117; *Conlon v. McGraw*, 66 Mich. 194; *Denison v. Ford*, 7 Daly, 384.

3. Was the defendant Hayden liable for the eviction? We think, under the circumstances of this case, that he was. He became assignee of an interest in the lease of the Hurd House. Plaintiff attorned to him, and he himself assisted in closing the hotel, thus working an eviction.

4. The circuit judge gave the jury the correct rule of damages, recovery being confined to the actual value of the unexpired term, less the rent reserved.

We do not think the introduction of testimony relative to the falling off in trade was wholly irrelevant to the question of the value of the use of the premises, and are satisfied that no error was committed to the prejudice of the defendants.

The judgment will be affirmed with costs.

The other justices concurred.

LANDLORD AND TENANT—WHAT AMOUNTS TO AN EVICTION.—If a room and power are let together in one contract, and the right to have the power furnished through a belt is appurtenant to the room, the throwing off of the belt by the landlord, and the keeping it off with a view to stopping the tenant's business, and compelling him to vacate the room, is an eviction, entitling him to recover such damages as he suffered thereby: *Brown v. Holyoke etc. Power Co.*, 152 Mass. 463; 23 Am. St. Rep. 844, and note. See, also, the note to *Keating v. Springer*, 37 Am. St. Rep. 185, and the extended note to *De Witt v. Pierson*, 17 Am. Rep. 62.

LANDLORD AND TENANT.—MEASURE OF DAMAGES FOR EVICTION: See the note to *Grommes v. St. Paul Trust Co.*, 37 Am. St. Rep. 258, and the extended note to *Taylor v. Bradley*, 100 Am. Dec. 428.

BROWN v. STUTSON.

[100 MICHIGAN, 574.]

DEEDS—DELIVERY IN ESCROW.—Delivery of a deed by a grantor to his daughter for subsequent delivery, upon the happening of a certain event, to another of his daughters, named as grantee therein, is a good delivery. Upon the happening of the event named the grantee may compel the delivery of the deed to her.

EVIDENCE—DECLARATIONS OF DECEDENT.—Statements made by a grantor that he had delivered a deed to his daughter to be delivered to another of his daughters, named as grantee therein, are admissible in evidence in an action, subsequent to the grantor's death, to compel a delivery of the deed to the grantee.

J. T. McCurdy and Fedewa & Walbridge, for the appellant.

W. McBride and M. Bush, for the respondent.

575 MONTGOMERY, J. The complainant and defendant are sisters, and heirs at law of William Tanner, deceased. The bill is filed by complainant to compel the defendant to deliver up to complainant a deed of a house and lot in the village of Vernon, executed by William Tanner, the father of the parties.

The bill alleges that, shortly before the death of Mr. Tanner, he executed the deed in question, and, for the purpose of making an equitable division of his property, gave to defendant fifteen hundred dollars, and delivered to her the deed of the premises in question, which were of about the same value, to be delivered to complainant at the death of her mother, which has since occurred. The defendant does not deny that such a deed was in fact drawn up and signed, nor that it is now in her possession; but she alleges that the deed was not delivered to her by Mr. Tanner in his lifetime, but that he retained it in his own possession, informing her where he had put it, and requested that she take possession of it after his death, and that she, after his death, took it into her possession. She further **576** alleges that the direction under which she received the deed was that she was to judge whether complainant cared for her mother properly during her lifetime, and that at the death of the mother the deed was to be delivered only in case complainant had given her proper support.

Upon the question of the terms upon which the deed was received by the defendant, and the conditions upon the performance of which she was to deliver it to complainant, she is disputed by the fact that Mr. Tanner made other provision

for his wife, as well as by his statements made in his lifetime. The question is mainly one of fact. If the deed was in fact delivered by the father before his death, to be thereafter delivered to complainant, this would constitute a good delivery: *Thatcher v. St. Andrew's Church*, 37 Mich. 264, 269, and cases cited.

Defendant contends that there was no competent evidence of delivery. But there is abundant evidence of the grantor's statements that the deed was delivered to the defendant by him, to be delivered to the complainant. These admissions, being by a party with whom the defendant is in privity, and relating to a fact which is provable by parol, are competent: *Keator v. Dimmick*, 46 Barb. 158; *Varick v. Briggs*, 6 Paige, 323; 22 Wend. 543; *Padgett v. Lawrence*, 10 Paige, 170; 40 Am. Dec. 232; *Baker v. Haskell*, 47 N. H. 479; 93 Am. Dec. 455; 1 Greenleaf on Evidence, sec. 189. See, also, *Proprietors of Church v. Bullard*, 2 Met. 363.

While defendant's testimony tends to rebut complainant's *prima facie* case, the circuit judge, who saw the witnesses, was not impressed with her version of the transaction, and we are convinced that he reached the correct conclusion.

The decree will be affirmed, with costs.

The other justices concurred.

DEEDS—DELIVERY IN ESCROW.—A deed delivered by the grantor to a third person to be delivered to the grantee, and by such person so delivered, is valid though the grantor is dead at the date of the last delivery: *Sneathen v. Sneathen*, 104 Mo. 201; 24 Am. St. Rep. 326, and note. See further on this subject the notes to *Jones v. Jones*, 16 Am. Dec. 40; *State Bank v. Evans*, 28 Am. Dec. 408, and *Perry v. Patterson*, 42 Am. Dec. 426.

EVIDENCE—DECLARATIONS OF DECEASED PERSONS.—The declarations of an ancestor to the effect that he had conveyed the property to the defendant are competent evidence in favor of the defendant and against his heirs: *Terry v. Rodahan*, 79 Ga. 278; 11 Am. St. Rep. 420, and note. See, also, the notes to *McLeod v. Swain*, 27 Am. St. Rep. 231; *Connecticut River Sav. Bank v. Albee*, 83 Am. St. Rep. 949, and *Currier v. Gale*, 77 Am. Dec. 846.

GLOBE IRON WORKS COMPANY v. STEAMER "JOHN B. KETCHAM, 2ND."

[100 MICHIGAN, 588.]

ADMIRALTY—MARITIME CONTRACTS—STATE JURISDICTION.—Contracts for the construction of vessels and water craft, and for the furnishing of materials therefor, before they are launched, are non-maritime. Liens and proceedings to enforce them are under state control, and may be enforced in state courts.

ADMIRALTY—STATE JURISDICTION—CONFLICT OF LAWS.—A state law providing a lien and method for its enforcement in the state courts, for building vessels or water craft, and furnishing materials and machinery therefor before the vessel is launched, is not in conflict with the United States admiralty law.

T. E. Tarsney and W. W. Wicker, for the appellant.

Hatch & Cooley, for the respondent.

584 GRANT, J. This is a proceeding to enforce a lien under the water craft law of this state, being chapter 285 of Howell's Statutes. The law now in existence was enacted in 1864, and was entitled "An act to provide for the collection of demands against water craft." The claim is for one boiler and attachments, one smokestack and umbrella with attachments, furnished and used in the building, fitting, furnishing, and equipping of the steamer *John B. Ketcham, 2nd*. The steamer was built, and the property which is the subject of his claim was furnished, in the state of Ohio. The water craft law of that state is similar to that of Michigan. Section 44 of the act (Howell's Stats., sec. 8278) reads as follows: "In cases where, by the general maritime law or laws of any other of the United States, now or hereafter to be passed, liens similar to those provided for in this act shall have been created against water craft, the same may be enforced under the proceedings established by this act in like manner as if they accrued in this state; and chattel mortgages upon such water craft, or other interest therein, held in such other states under the laws thereof, may be enforced hereunder against surplus proceeds, in like manner as if held in this state under its laws."

585 The amended complaint is as follows:

"To the circuit court for the county of Wayne:

"The amended complaint of the Globe Iron Works Company against the steamer *John B. Ketcham, 2nd*, her engines, boats, tackle, apparel, and furniture, and against all

persons lawfully intervening for their interest therein, in a cause of contract, alleges as follows:

"First. That the said complainant is a corporation duly organized and existing under the laws of the state of Ohio.

"Second. That said steamer is a water craft of above five tons burthen, used and intended to be used in navigating the waters of this state, and said steamer also navigates the waters within and bordering upon the state of Ohio, and also the great lakes and their connecting waters, and, amongst others, lakes Erie, St. Clair, and Huron, and the Detroit and St. Clair rivers; that she was built by her owners, Bills & Koch, hereinafter mentioned, with the intent and for the purpose of being so used in navigating said lakes and waters, and that they so intended to use said vessel during all the time she was being built.

"Third. That on or about the 14th day of May, 1892, at the special instance and request of Oscar P. Bills and Edward E. Koch, who were then the owners of said steamer, and were copartners doing business under the firm name of Bills & Koch, said complainant furnished to said steamer the materials and machinery set forth in the statement hereto annexed, marked 'Schedule A,' and made a part hereof, to be used, and which were actually used, in and about the building, fitting, furnishing, and equipping said steamer, said steamer then being in the process of construction, and such materials and machinery being intended to be used, and actually were used, in and about the original building, constructing, fitting, furnishing, and equipping said steamer; that for said materials said copartners agreed, to and with said complainant, to pay said complainant the amount of money, and the interest thereon, stated in the said schedule, to wit, the sum of \$4,054.72, \$3,936.33 thereof on the 25th day of November, 1892, and \$118.39 thereof on the 25th day of August, 1892.

"Fourth. That said materials and machinery are reasonably worth the sums of money charged for them in said schedule.

"Fifth. That, at the time of the commencement of this action, there was, and now is, due said complainant for the said materials the sum of \$4,054.72, with interest on \$3,936.33 thereof from the 25th day of November, 1892, at the rate of six per cent per annum, and on \$118.39 thereof

from the 25th day of August, 1892, at the same rate, and that no part of the same has ever been paid.

"Sixth. That the said contract for furnishing the materials and ~~586~~ machinery aforesaid was made and performed by the said complainant, and the said materials and machinery were accepted and used, and intended to be accepted and used as aforesaid, by the said Bills & Koch, in the said state of Ohio; that at the time of the making of said contract between the said complainant and the said Bills & Koch, and at the time the said complainant so furnished the said materials and machinery, the said vessel, as said complainant is informed and believes, was then upon the land in said state of Ohio, and not in the water, and had never been in the water, and had never been launched, and that at the time of the making of said contract it was the intent and purpose of both the said complainant and the said Bills & Koch that the said machinery should be placed in the said vessel before she was removed from the land or launched or placed in the water, and that the said materials and machinery were so placed in the said vessel while she was upon the land, and before she was launched or placed in the water; that at the time of the making of said contract, and at the time the complainant performed the same by the delivery of said materials and machinery, and at the time the same was so placed in said vessel by said Bills & Koch, the said vessel, as the complainant is informed and believes, had not been licensed or enrolled under the acts of Congress.

"Seventh. Complainant further alleges that, on and for a long time prior to the said 14th day of May, 1892, and during all the time since, there have been, and now are, created, by the laws of the state of Ohio, liens against water craft similar to those provided for by chapter 285 of Howell's Annotated Statutes of the state of Michigan.

"Eighth. That the laws of the state of Ohio, on and for a long time prior to said 14th day of May, 1892, and during all the time since, have provided, and do now provide, that any steamboat or other water craft navigating the waters within or bordering upon said state shall be liable, and such liability shall be a lien thereon for all debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies, or labor in building, repairing, furnishing, or equipping of the same.

"*Ninth.* That the laws of said state further provide that the liens hereinbefore mentioned may be enforced in a proceeding in the nature of a proceeding *in rem* against the water craft against which they accrue by name.

"*Tenth.* That, by the laws of the state of Ohio aforesaid, a lien in favor of said complainant has been created and now exists against the said steamer, for the said sum of \$4,054.72, with interest thereon as aforesaid, and by reason of the premises and of the statute in such case made and provided said complainant is entitled to and has a lien upon, the said steamer *John B. Ketcham, 2nd*, ⁵⁸⁷ for the sum of of money last mentioned, and interest thereon as aforesaid, which lien is enforceable under the statutes of this state in such case made and provided; that said complainant is informed and believes that, since its said lien has accrued, said steamer has been sold by said copartnership, but to whom said complainant does not know, but positively avers that the present owners of said steamer are not *bona fide* purchasers thereof without notice, but that, on the other hand, they had full notice and knowledge of the said lien of the complainant at the time they purchased said steamer.

"*Wherefore*, said complainant prays that process in due form, according to the course and practice of this court, under the statute in such case made and provided, may issue, directed to the sheriff of said county, commanding him to seize and safely keep said steamer *John B. Ketcham, 2nd*, her tackle, apparel, and furniture, to answer all such liens as shall be established against it according to law, and to make return of his proceedings under such warrant, pursuant to said statute; and also that, pursuant to said statute, a summons to the owner or master of said steamer be issued in due form, and that judgment may be rendered in favor of said complainant for its claim aforesaid, and that the same may be satisfied, and the complainant's said lien against said steamer may be enforced, according to the statute in such case made and provided, and that said complainant may have such other and further relief in the premises as the case may entitle it to."

The defendant owner demurred to the complaint upon the ground that it did not set forth a cause of action cognizable by the state court, but that, the vessel being engaged in commerce upon the great lakes, proceedings *in rem* to enforce the collection of a claim against her can be maintained

only in the United States courts in admiralty. The demurrer was overruled, and the defendant appeals.

But one question is raised by the defendant, viz., whether the United States admiralty court has exclusive jurisdiction in the case. The solution of the question depends upon the character of the contract. If the contract under which this machinery was furnished is a maritime contract, then the United States courts have exclusive jurisdiction; if it is a non-maritime contract, then the state court has jurisdiction, and the remedy provided by the state water-craft ⁵⁸⁸ law is valid. The learned counsel for the defendant have cited many authorities where the jurisdiction of the state courts was denied over proceedings *in rem* instituted in such courts upon maritime contracts and maritime torts. Among these are the following: *The Hine v. Trevor*, 4 Wall. 555; *The Moses Taylor*, 4 Wall. 411; *The Belfast*, 7 Wall. 624; *Brookman v. Hamill*, 43 N. Y. 554; 3 Am. Rep. 731; *In re Steamboat Josephine*, 39 N. Y. 19; *Steamer Petrel v. Dumont*, 28 Ohio St. 602; 22 Am. Rep. 397; *Campbell v. Sherman*, 35 Wis. 103; *Vose v. Cockcroft*, 44 N. Y. 415; *The General Buell v. Long*, 18 Ohio St. 521; *Weston v. Morse*, 40 Wis. 455; *Ferran v. Horsford*, 54 Barb. 200.

In the case of *The Moses Taylor*, 4 Wall. 411, suit was brought in a state court on a contract for the transportation of a passenger, which was held to be a maritime one, like the transportation of merchandise.

The Hine v. Trevor, 4 Wall. 555, was a case of collision on the Mississippi river, near St. Louis. The libelants brought suit under the state law of Iowa, which subjugated the vessel to sale in satisfaction of the damages sustained. *Held*, a maritime tort.

In *The Belfast*, 7 Wall. 624, the libelants sued in the state court for the loss of twenty-nine bales of cotton while in transportation. *Held*, a maritime contract.

The libelants in *In re Steamboat Josephine*, 39 N. Y. 19, were proceeding to enforce a lien under the state law for supplies, etc., furnished to the vessel while engaged in commerce between the port of New York and a port in the state of New Jersey.

In *Steamer Petrel v. Dumont*, 28 Ohio St. 602, 22 Am. Rep. 397, a case greatly relied upon by the defendant's counsel, it was held that contracts for supplies furnished at the home

port, while the vessel was engaged in navigation, were maritime contracts.

These will sufficiently illustrate the character of the cases. In all the jurisdiction of the state court was denied because the contracts involved were maritime.

It is equally well established by a long line of authorities,⁵⁹⁹ in both the federal and the state courts, that state courts have jurisdiction over cases founded upon non-maritime contracts or non-maritime torts: *Edwards v. Elliott*, 21 Wall. 532; *Johnson v. Chicago etc. Elevator Co.*, 119 U. S. 388; *Foster v. The Richard Busteed*, 100 Mass. 409; 1 Am. Rep. 125; *McDonald v. The Nimbus*, 137 Mass. 360; *Sheppard v. Steele*, 43 N. Y. 52; 3 Am. Rep. 660; *King v. Greenway*, 71 N. Y. 413; *Wilson v. Lawrence*, 18 Hun, 56; affirmed 82 N. Y. 409; *Scow "M. Tuttle" v. Buck*, 23 Ohio St. 565; 13 Am. Rep. 270; *Sinton v. Steamboat Roberts*, 34 Ind. 488; 7 Am. Rep. 229; *Hay v. Steamboat Winnebago*, 10 Wis. 428; *Thorsen v. The J. B. Martin*, 26 Wis. 488; 7 Am. Rep. 91. In each of the above cases the proceeding was *in rem*.

The jurisdiction of the admiralty courts over cases founded upon non-maritime contracts has been denied in the following cases: *Roach v. Chapman*, 22 How. 129; *People's Ferry Co. v. Beers*, 20 How. 393; *Cunningham v. Hall*, 1 Cliff. 43; *Young v. The Orpheus*, 2 Cliff. 29; *The Pacific*, 9 Fed. Rep. 120; *The Count De Lesseps*, 17 Fed. Rep. 460.

The fundamental error on the part of the defendant lies in the apparent assumption that the machinery in the present case was furnished under a maritime contract. Whatever may once have been the rule, it is now established beyond controversy that contracts for the construction of vessels, and for the furnishing of materials therefor, before they are launched, are non-maritime, and that liens and proceedings to enforce such liens are under state control, and may be enforced in state courts. The latest enunciation of the doctrine by the supreme court of the United States is found in the case of *The J. E. Rumbell*, 148 U. S. 11, where it is said: "It is now settled that a contract for building a ship, being a contract made on land, and to be performed on land, is not a maritime contract, and that a lien to secure it, given by local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty."

⁵⁹⁹ Many authorities are there cited and commented upon. In the case of *Steamer Petrel v. Dumont*, 28 Ohio St., 602, 22

Am. Rep. 397, it was said that "contracts for boat or ship-building are not maritime contracts": See, also, *Lake v. The Manhattan*, 46 Fed. Rep. 797; *Edwards v. Elliott*, 21 Wall. 532; *Roach v. Chapman*, 22 How. 129; *Cunningham v. Hall*, 1 Cliff. 43; *The Pacific*, 9 Fed. Rep. 120; *The Count De Lesseps*, 17 Fed. Rep. 460.

After the vessel is launched, contracts for equipment, or repairs, or material are maritime. Before the vessel is launched, they are contracts upon land, and are non-maritime. The distinction is so clearly pointed out in the numerous authorities above cited, and the rule so firmly established, that we deem further discussion unimportant. The reason for the distinction appears to be that in the former case the vessel is engaged in commerce, while in the latter case she is not, or, as stated in *Lake v. The Manhattan*, 46 Fed. Rep. 797, "a ship *in esse* as a maritime subject gives a maritime character to all transactions directly connected with it." That is an interesting case, both in drawing the distinction, and giving the reasons therefor which are supposed to exist.

The water-craft law of Michigan, substantially in its present condition, so far as this question is concerned, has been upon the statute books since 1839: Act No. 43, Laws of 1839. Many cases arose under it prior to 1863, in none of which does the validity of the act appear to have been questioned. In *Parsons v. Russell*, 11 Mich. 113, 83 Am. Dec. 728, one feature of the act was held unconstitutional because it violated the provision of the constitution that "no person shall be deprived of life, liberty, or property, without due process of law," in that it did not provide for a determination of the validity or amount of the claim before a judicial tribunal, but authorized the seizure and sale of a vessel upon the mere assertion of the debt or demand. Upon this point, however, the court was divided. ⁵⁹¹ In 1864 the legislature, in view of that decision, passed a new act, incorporating the main provisions of the old. It differed from that mainly in providing judicial proceedings to establish and enforce the lien. Several cases have since been brought under the law, in none of which has its validity been attacked. It certainly cannot be held, under the authorities, to conflict with the laws of the United States in providing a lien and methods for enforcing such lien for the building of

vessels and the furnishing of materials therefor before the vessel is launched into the waterways of commerce.

Judgment affirmed.

The other justices concurred.

SHIPPING—MARITIME CONTRACTS—WHAT ARE NOT.—A contract for building a ship or supplying engines, timber, or other material for its construction is not a maritime contract: *The Victorian*, 24 Or. 121; 41 Am. St. Rep. 838, and note. See, also, the note to *Atlantic Works v. Tug Glide*, 34 Am. St. Rep. 309.

ADMIRALTY JURISDICTION—CONFLICT OF LAWS.—Proceedings *in rem* in state courts against a vessel to enforce a lien given by a state statute for materials furnished in its construction may be maintained without interfering with the jurisdiction vested in the courts of the United States respecting maritime causes of action: *The Victorian*, 24 Or. 121; 41 Am. St. Rep. 838, and note.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

SORENSEN v. SWENSEN.

[55 MINNESOTA, 58.]

JUSTICE OF THE PEACE—JUDGMENT.—The statute requiring a justice of the peace to “forthwith render judgment,” simply means that it shall be rendered within a reasonable time after the verdict is received, in view of the circumstances surrounding the particular case.

JUSTICE OF THE PEACE—JUDGMENT—REASONABLE TIME.—A judgment rendered by a justice of the peace on Monday, upon a verdict returned on the preceding Saturday, is within a reasonable time after verdict if he was then busy with other cases.

JUDGMENT was rendered in a justice’s court against Swensen, from which he appealed.

C. E. Brame, for the appellant.

Merrick & Merrick, for the respondent.

59 **BUCK, J.** This case comes here upon an appeal from a judgment of the district court of Hennepin county affirming a judgment of a justice’s court in said county. The principal question involved, and the only one which we deem it necessary to consider, is whether, upon the return of the verdict in the justice’s court, the justice forthwith rendered judgment, and entered the same in his docket. To fully understand this legal question raised by the appellant we quote a portion of the return of the justice, which is as follows: “Jury returned a verdict for plaintiff for nineteen and two one-hundredths dollars (\$19.02) damages and cost of suit between the hours of 12 M. and 1 P. M., August 20, 1892, whereupon judgment was entered in favor of plaintiff, and against the defendant, for

nineteen and two one-hundredths dollars (\$19.02) damages, and costs, taxed at sixty-seven and sixty-eight one-hundredths dollars (\$67.68); total, eighty-six and seventy one-hundredths dollars (\$86.70). Said judgment was not written up till August 22, 1892, as the court was engaged in other cases, and could not write it up sooner.

"Dated August 22, 1892.

"ELIJAH BARTON, Justice of the Peace."

The contention of the appellant is that upon the return of the verdict the justice should have rendered his judgment thereon instantly, and entered the same in his docket, and that, not having done so until August 22d, he lost jurisdiction of the case; and to sustain this position he cites the General Statutes of 1878, chapter 65, section 68, which is as follows: "In cases where the plaintiff is nonsuited or withdraws his action, or where judgment is confessed and in all cases where a verdict ^{is} rendered, the justice shall forthwith render judgment and enter the same in his docket."

The twenty-first day of August, 1892, was Sunday. Of this fact the court will take judicial notice. Under the laws of this state no one of the courts is allowed to be open on Sunday for the purpose of rendering judgments. The act of the justice in writing up the judgment was performed on the first court day after the return of the verdict. There are several cases decided by the supreme court of Wisconsin where it was held, in construing a statute like ours, that upon the return of the verdict the justice must render judgment upon the same instantly. The supreme court of Iowa held to the contrary in the case of *Burchett v. Casady*, 18 Iowa, 344, where it is decided that the word "forthwith," in such a statute, means within a reasonable time. We think that the ends of justice will be better subserved by a liberal and equitable construction of the law and practice relating to justice's courts than by the adoption of a harsh and unbending rule of strict construction. We therefore hold that the word "forthwith," in the section of our statute quoted, means, as there used, that the judgment must be rendered within a reasonable time after the return of the verdict. What constitutes such reasonable time will depend on the circumstances surrounding each particular case. There should be no unreasonable delay. In this case it appears that at the time of the return of the verdict the justice was engaged in hearing other

cases, and was thereby prevented from rendering his judgment sooner. That he used reasonable diligence and exertion in the performance of his duty seems unquestionable, and the judgment of the district court is affirmed.

JUDGMENT OF JUSTICE OF THE PEACE—TIME OF ENTRY.—The justice must enter judgment at once in accordance with the verdict: *In re Dance*, 2 N. Dak. 184; 33 Am. St. Rep. 768. A delay of ninety days will render it void: *Tomlinson v. Litze*, 82 Iowa, 32; 31 Am. St. Rep. 458. If the statute requires him to render it within a given time he cannot do so afterward: *Sibley v. Howard*, 3 Denio, 72; 45 Am. Dec. 448. If the statute requires him to render it "forthwith," and he at once renders judgment after verdict, the judgment will not be reversed because it was not entered in the docket until two or three days afterward: *Hall v. Tuttle*, 6 Hill, 38; 40 Am. Dec. 382.

UNION CENTRAL LIFE INSURANCE CO. v. TAGGART.

[55 MINNESOTA, 95.]

INSURANCE—PAYMENT OF PREMIUM BY PROMISSORY NOTES—CONSIDERATION.—Though one of the conditions of an insurance policy is that it "shall not be valid or binding until the first premium is paid," if it is silent as to the mode of payment, promissory notes received by the company, even in the absence of any express agreement, must be deemed to have been accepted in payment of the premium. The policy is binding, and is a valid consideration for the notes.

ACTION on certain promissory notes given in payment of a premium on an insurance policy. The plaintiff insured defendant's life, one of the conditions of the policy being that it should not be valid until the first year's premium was paid. Defendant paid part of it in cash, and gave his three promissory notes for the remainder. Suit was brought upon the notes after maturity and plaintiff obtained judgment. Defendant moved for a new trial. His motion was denied and he appealed.

J. F. Keene, for the appellant.

Charles P. Barker, for the respondent.

•• **MITCHELL, J.** The notes in suit were executed for part of the first year's premium on a policy of insurance on the life of the defendant. One of the conditions annexed to the policy was that it "shall not be valid or binding until the first premium is paid to the company or its authorized agent." The main contention of the defendant, and the only one we deem it necessary to consider, is that there was

an entire want of consideration for the notes, for the reason that, under the condition quoted, the policy never became operative, because the first year's premium had not been paid in cash. There is clearly nothing in this point.

It is usually provided that the policy, though delivered, shall not be binding until the premium is paid; and, where this is the case, the policy does not take effect, even though delivered, until the provision is complied with. But the mode of payment of the premium is immaterial if it be accepted by the company or its agent, and no special mode be provided for in the policy. The policy was silent as to the mode of payment. It was delivered with a receipt for the first year's premium attached, countersigned by the company's agent who accepted defendant's notes for part of it. On this state of facts, even in the absence of any express agreement to that effect, the company must, in judgment of law, be deemed to have accepted the notes in payment of the premium: See *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. 390-402.

¶ This constituted a consideration for the notes. There is no other point in the case worthy of any special consideration. Order affirmed.

INSURANCE—VALID PAYMENT OF PREMIUM.—ACCEPTANCE OF A PROMISSORY NOTE for the premium is a waiver of the condition for prepayment of the premium on an insurance policy, and a payment in accordance with a custom to give credit, even after a loss, will be valid in spite of a provision in the policy avoiding it for nonpayment of premium: *Lebanon Mut. Ins. Co. v. Hoover*, 113 Pa. St. 591; 57 Am. Rep. 511, and note.

SCHILLING v. MULLEN.

[55 MINNESOTA, 122.]

ASSIGNMENT OF PART OF CLAIM, DEMAND, OR OBLIGATION may be made, and the courts will recognize and protect the equitable interest of the assignee.

ASSIGNMENT OF PART OF CLAIM—ACTION.—If part of an obligation or demand has been assigned the assignee can maintain an action to recover his share by joining the assignor and assignee as plaintiffs; or, if the former does not join, by making him a defendant, so that the whole controversy may be settled in one suit.

NOTICE OF AN ASSIGNMENT OF A DEMAND OR OBLIGATION, or a part thereof, given to the debtor, fixes the rights of the parties, and protects the assignee.

ASSIGNMENT OF PART OF DEMAND—NOTICE—PAYMENT.—A debtor making payment in full to his creditor after notice that a part of the obligation has been assigned, is still liable to the assignee for his share of the claim.

ACTION by plaintiff to recover his part of a claim assigned to him. . The defendant McFadden, in January, 1892, sold and delivered to defendant Mullen his confectionery store. McFadden was then employed by Mullen as a clerk at a salary of eighteen dollars a week. A few days after this arrangement the plaintiff recovered a judgment against McFadden, and instituted proceedings supplemental to execution. In February, 1892, McFadden settled by assigning to plaintiff fifteen dollars a month of his salary, and by giving an order on Mullen to pay that amount each month out of his salary to plaintiff, until the judgment should be paid. On the next day plaintiff notified Mullen of the assignment, and gave him a copy of the order. These monthly installments were demanded as they became due, but nothing was obtained. In the following December plaintiff requested McFadden, who was still at work for Mullen, to unite with him in an action against Mullen to recover the money, but he refused. Plaintiff then brought an action against Mullen, and joined McFadden as a codefendant. Mullen answered, by way of counterclaim, that McFadden was owing him one hundred dollars, when the copy of the order was handed to him, no part of which had been paid. He further answered that on March 10, 1892, McFadden revoked the order and directed him to pay the plaintiff nothing, and demanded that his wages be paid to him personally each week, and that he had accordingly paid McFadden in full. McFadden answered that Mullen had paid him for his services in full as the services were performed, and owed him nothing. There was entered a judgment for plaintiff on the pleadings, and Mullen appealed.

Leon T. Chamberlain, for the appellant.

Johnson W. Straight and Leonard A. Straight, for the respondent.

125 COLLINS, J. In *Canty v. Latterner*, 31 Minn. 242, it was determined, in accordance with the weight of authority, that an assignment of a part interest in a demand or obligation might be made, and that the courts would recognize and protect the equitable interest of the assignee. This doctrine was referred to in *Dean v. St. Paul etc. R. R. Co.*, 53 Minn. 504, where the real question was whether a separate and independent action could be maintained by the assignee to recover his share of the demand, the debtor refusing to recog-

nize the assignment. The conclusion of the court was that such an action would not lie, but it was said, in substance, that where the assignor and assignee were joined as plaintiffs, or the former, not joining, was made a defendant, so that the whole controversy might be settled in one suit, the action could be sustained. By means of proper allegations in the complaint the assignor, McFadden, was made a party defendant to this action, and on this branch of the case the court below ruled correctly when ordering judgment for plaintiffs on the pleadings.

In addition to the one just disposed of, several points are made by appellant's counsel, only one of which needs special consideration. The others are without merit. The plaintiff's claim was a little less than one hundred dollars when they obtained the assignment from defendant McFadden. In his answer defendant Mullen alleged that prior to the time of the execution and delivery of such assignment, and consequently before he had notice of it, McFadden had received from him a sum exceeding one hundred dollars upon a promise to return and repay the same; that he had not returned or repaid any part thereof; and that the whole remained due and unpaid. These allegations constituted, it is claimed, a complete defense to plaintiffs' cause of action, because they would have been a perfect defense, by way of counterclaim, if found in an answer interposed in an action for services brought by McFadden against Mullen.

From the pleadings in this action it clearly appears that under McFadden's contract with Mullen the former had earned a trifle less than eight hundred dollars between the day upon which due notice of the assignment ¹²⁶ was served on the latter and the day this action was brought, some eleven months, and it was alleged in Mullen's answer that he had fully paid McFadden for the services admitted to have been rendered, as before stated, so that it may be taken as conclusively shown that, when this action was commenced, the former was indebted to the latter about seven hundred dollars, over and above all setoffs, or that, subsequent to notice of the assignment, he had paid over about that sum to McFadden, ignoring the fact, which had been brought to his knowledge, that these plaintiffs had an assignment for a portion of it. If he still owes the amount earned, the plaintiffs are entitled to the sum which McFadden assigned and ordered to be paid over to them. If, upon the other hand, Mullen has

paid over to McFadden the entire amount of his earnings, thus paying over money which belonged to plaintiffs, and in total disregard of the assignment, the loss, if any, will have to be sustained by Mullen, not by plaintiffs. The notice of assignment duly served upon Mullen fixed the rights of all parties, and protected the assignees. The effect of such assignment and notice could not be avoided, directly or indirectly, by any thing Mullen might do.

Judgment affirmed.

AN ASSIGNMENT OF PART OF A DEMAND is good in equity, though not at law: *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740, and note; *Whittemore v. Judd etc. Oil Co.*, 124 N. Y. 565; 21 Am. St. Rep. 708, and note; *Exchange Bank v. McLoon*, 73 Me. 498; 40 Am. Rep. 388; *Thalhimer v. Brinckerhoff*, 3 Cow. 623; 15 Am. Dec. 308. The assignment may be made either by direct transfer or by an order drawn upon the particular fund: *Harris Co. v. Campbell*, 68 Tex. 22; 2 Am. St. Rep. 467, and monographic note thereto discussing the subject of assignment of part of a demand. No particular form of words or writing is necessary to effect it. It may be wholly in writing or in parol, or partly in both, but it must designate the particular fund upon which it is intended to operate. After notice to the debtor he is bound to apply the fund according to the terms of the assignment: *McDaniel v. Maxwell*, 21 Or. 202; 28 Am. St. Rep. 740; but, if payment is made before notice of the assignment, the debtor is not liable to the assignee: *Harvin v. Galluchat*, 28 S. C. 211; 13 Am. St. Rep. 671. The debtor's acceptance or promise, in equity, neither creates, increases, nor diminishes his liability to the assignee: See monographic note to *McDaniel v. Maxwell*, 28 Am. St. Rep. 746.

AULTMAN v. CLIFFORD.

[55 MINNESOTA, 159.]

PAROL EVIDENCE IS ADMISSIBLE TO FILL OUT INCOMPLETE CONTRACT.—

If a written order for the purchase of a chattel is incomplete, parol evidence is as admissible to show what the whole agreement was as that the article was ordered upon condition that it should be of a certain quality, and that performance on the buyer's part depended upon a compliance with the condition.

CONTRACTS—AMBIGUITY.—If a written order for the purchase of a chattel contains the words "note for one hundred and ten dollars; three fall payments at eight per cent," the time of payment is uncertain and ambiguous, and the order is incomplete on its face.

SALE.—A DELIVERY OF PROPERTY SO AS TO PASS THE TITLE, and make the transaction an executed contract of sale, must be a delivery of the property corresponding with the order or contract of purchase, which is a condition precedent to the vesting of the title in the vendee.

DEFENDANT appealed from an order granting plaintiff's motion for a new trial after a verdict for the defendant.

A. S. Crossfield, for the appellant.

E. T. Young, for the respondent.

159 BUCK, J. The plaintiff brought suit against the defendant in the district court for the sum of one hundred and ten dollars upon the instrument, of which the following is a copy, viz:

“July 13th, 1891.

“I have this day ordered of Aultman, Miller & Co. one seven-foot Buckeye binder, for which I agree to pay one hundred and forty dollars—note for one hundred and ten dollars, and his old McCormick binder; three fall payments at eight per cent. The binder to be delivered on or before July 25th, 1891.”

Before the last-named date the parties substituted a six-foot binder, with bundle carrier, in the place of the seven-foot binder mentioned in the original order, but upon the same terms. The **160** defendant refused to execute the notes, for the reason that the binder was not such as plaintiff represented and warranted it to be. In the month of December following this action was commenced for the full amount of the three notes mentioned in the order. The defendant answered, and alleged that at the time of ordering said machine, and as part of the terms of the contract of said purchase, plaintiff orally represented that it would furnish a binder to be of good material, well made, light draft, and as good as any other machine manufactured for the purpose of cutting and binding grain, and that the binder so to be furnished would in fact cut and bind grain as well as any other machine manufactured for such purpose; and that defendant, relying upon such representations, was thereby induced to give such order.

Upon the trial the evidence fully sustained the contention of the defendant, and the jury so found.

Before submitting the case to the jury the plaintiff asked the court to instruct the jury to find a verdict for plaintiff, for the reason that the contract of sale in this case was in writing, and contained no warranty, and that, therefore, no oral warranty could be shown to vary the terms of the written contract. The court denied this motion, and the plaintiff excepted. Afterward the plaintiff moved for a new trial, upon the minutes of the court, and it granted a new trial, holding that this case is controlled by the decisions of this

court in the cases of *Thompson v. Libby*, 34 Minn. 374, and *Kessler v. Smith*, 42 Minn. 494.

Nothing in this opinion is to be construed as in any manner trenching upon the rule or doctrine laid down in those cases.

This was an executory instrument. The plaintiff had twelve days in which to furnish the binder, and the notes were to be executed in the future. It does not appear that the binder was in existence at the time the order was given. The defendant had no opportunity to inspect it or test its fitness or capability for doing the work for which he had ordered it. Now, a party receiving an order for a binder for doing a certain kind of work does not fulfill the conditions of the order by furnishing a binder of a different kind, and which will not do the work of the binder ordered.

This is not the case of a binder being present at the time the order ¹⁶¹ was given, and the seller then warranting the binder to do good work, but a case of an executory instrument, incomplete on its face, and not purporting to give the whole of the mutual executory engagements of the parties.

The term "three fall payments, at eight per cent," of one hundred and ten dollars, is uncertain and ambiguous. The term "fall," when applied to the seasons of the year, is defined by Webster to mean "the season when the leaves fall from the trees." If the word "fall," as used in this order, means during the months of September, October, and November, then its ambiguity is apparent, for in such case it would be payable in some of those months; but whether September 1st, or the middle of October, or the last day of November, there is no legal way of determining. The plaintiff might claim that the payments would each be due the first day of September of each year, and the defendant with equally as much confidence claim that they would not be due until the last days of November of each year, and this ambiguity lead the parties into that very litigation which the law seeks to avoid, by requiring contracts to be definite and certain, or, in other words, complete contracts in themselves. If there was no time mentioned at all, then it would be understood by the parties to be a cash payment, or that delivery and payment were to be concurrent acts. In the case of *O'Donnell v. Leeman*, 43 Me. 158, 69 Am. Dec. 54, an instrument of sale provided that the consideration should be one-third cash down, but it was silent as to when the rest should be paid,

and it was held to be an incomplete instrument, and that no action could be maintained upon it at law or in equity. In this case there was not that legal delivery or acceptance of the property which passed the title to the defendant. There was an actual physical delivery of the binder to the defendant, and a temporary use of it by him, but he did not receive any substantial benefit from its use, and returned it to the premises of the plaintiff, where it was left, although plaintiff refused to accept it. A delivery of property, so as to pass the title to it and make the transaction an executed contract, should be a delivery of the property corresponding with the order or contract, which is a condition precedent to the vesting of the title in the vendee: 10 Am. & Eng. Ency. of Law, 104, 105. The written instrument or order being incomplete, and not purporting ¹⁶² on its face to express the whole of the mutual agreement of the parties, parol evidence was admissible to show an oral agreement on the part of plaintiff, which constituted a condition on which defendant gave the written order, and on which performance on his part was to depend, as that the binder should be of a certain quality. The jury must have found that the plaintiff did not in this respect comply with its parol warranty and representations, and, if not, then there was not such legal delivery and acceptance of the binder by defendant as bound him to retain or pay for it.

The oral evidence respecting the parol warranty was properly admitted, and the court below erred in granting a new trial. For this error the order granting such new trial is reversed.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE THAT A WRITTEN CONTRACT HAS BEEN ADDED TO, CHANGED, OR SUPERSEDED BY AN ORAL AGREEMENT: *Bannon v. Aultman*, 80 Wis. 307; 27 Am. St. Rep. 37. A parol agreement collateral to, but not inconsistent with, the written agreement on a distinct subject matter, may be proved: *Durkin v. Cobleigh*, 156 Mass. 108; 32 Am. St. Rep. 436, and note. If a written contract of sale is manifestly incomplete parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, kind, or quantity: See note to *Green v. Batson*, 5 Am. St. Rep. 197.

PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN AN AMBIGUITY IN A WRITING whether latent or patent: *Shore v. Miller*, 80 Ga. 93; 12 Am. St. Rep. 239, and note. For a case of a latent ambiguity, rather than of mistake as to the person designated as beneficiary in a deed, see *Houston v. Bryan*, 78 Ga. 181; 6 Am. St. Rep. 252.

SALES.—DELIVERY OF GOODS, even to a carrier, under an executory contract of sale vests title in the vendee, if they correspond with the contract;

but the rule is otherwise where the goods do not so correspond: *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831, and note. In case of an executory contract for the manufacture of articles to be delivered at a future day there is always an implied warranty that the articles delivered shall answer the purpose for which they were designed: See note to *McCray Refrigerator etc. Co. v. Woods*, 41 Am. St. Rep. 606. The purchaser is not bound to accept articles of a different kind or quality from those ordered for his purpose. That an article shall possess certain qualities is not a mere warranty, but a condition precedent to liability on the part of the vendee: *American Bronze Co. v. Gillette*, 88 Mich. 231; 26 Am. St. Rep. 286, and note; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147; 30 Am. St. Rep. 421. That there is an implied warranty that a manufactured article will answer the purpose intended, see *Edwards v. Dillon*, 147 Ill. 14; 37 Am. St. Rep. 199, and note.

GIBSON v. MINNEAPOLIS, ST. PAUL, AND SAULTE STE. MARIE RAILWAY COMPANY.

[55 MINNESOTA, 177.]

JURY TRIAL.—THE COURT HAS A RIGHT TO URGE THE JURY TO AGREE UPON A VERDICT. Hence, after the jury has been out over twenty hours, it is not error for the trial court, upon the jury's coming in a second time, to instruct that, if one or two of them differ in their views of the evidence from the others, they should thereby be induced, although not required, to surrender conscientious convictions, and to doubt the correctness of their own judgments, and that this disparity of opinion should lead them to inquire whether they are not mistaken.

JURY TRIAL—INSTRUCTIONS.—It is not error for the court to refuse to give an instruction fully covered in the general charge.

A VERDICT WILL NOT BE DISTURBED ON APPEAL if there is any evidence to support it.

ACTION to recover damages for injuries occasioned by negligence. The plaintiff, Gibson, was a locomotive engineer employed by defendant on a switch engine in its yard. Plaintiff testified that on August 25th he entered in the repair-book at the engine-house a request to fix the footboard, described in the opinion, that it was not fixed, and that it fell on August 29th. The fireman on the engine testified that the footboard did not fall down, that on a former trial he had testified falsely, at plaintiff's instance, that it did fall, and that he had fixed it up again the same evening. Another witness testified that no entry was made in the repair-book as to this engine on August 25th; that Gibson came to the engine-house the next March, and made the entry at that time in his presence, and induced him to testify falsely on the former trial that the entry was made on August 25th.

Plaintiff's cause of action rested upon his report of August 25th in the repair-book, and the promises made by the foreman of the engine-house on August 26th and 28th to fix the footboard. No liability of the railway company was shown outside of this report and such promises. A verdict for four thousand dollars was obtained by plaintiff. Defendant appealed from an order denying his motion for a new trial.

C. D. & Thomas D. O'Brien, and Alfred H. Bright, for the appellant.

George B. Edgerton, John D. O'Brien, and John A. Lovely, for the respondent.

¹⁷⁹ COLLINS, J. Action for damages alleged to have been the result of defendant's negligence while plaintiff was in its employ as a locomotive engineer. He worked a switching locomotive of peculiar construction. In the cab, elevated from the floor, was a narrow footboard or platform upon which the engineer stood when at work, that he might be the better enabled to see signals given by switchmen outside, and to handle the locomotive. On one end of this board or platform was a movable box. The plaintiff claimed that this footboard became loose; that he twice notified Bardsley, the person in charge of repairs, of this fact, and also called for its repair by means of a book kept in the office for that purpose; that he was assured and promised by Bardsley that the repairs should be made, and told to go on with his work; that he did continue to use the locomotive, relying on the assurance and promise; and that a few days afterwards, on the twenty-ninth day of August, about 6 o'clock P. M., the board or platform gave way while he was handling the locomotive, throwing him down upon the floor of the cab, and upon the box before mentioned, and causing the injuries complained of. The case was twice tried before the same district judge, and ¹⁸⁰ a verdict obtained for the plaintiff each time. The first verdict was set aside, really upon the sworn confessions of two of plaintiff's most important witnesses that they had perjured themselves when testifying in his behalf. As may be surmised, this condition of affairs aroused the counsel for the respective parties, and led to a protracted and closely fought struggle when the case again came on for trial. We are warranted in saying, after an examination of the complete record, that nothing was omitted which would tend to

develop the truth, and aid the jury in arriving at an intelligent verdict, by the able counsel employed to try the case.

Taking such of the assignments of error as need be referred to in order, we find that the first is addressed to the refusal of the court to charge as requested by defendant, in effect, that plaintiff could not recover for any injury, except that received on August 29th, at the time one Burton took the engine, finished the work, and afterward aided the plaintiff to his house; and, if the jury found the injury was really received October 30th, the verdict must be for the defendant.

Counsel for defendant spent considerable time during the trial in an attempt to show that plaintiff received the injuries of which he complained on the 30th of October, and that an illness which attended him about August 29th, and for a few weeks afterward, was brought about by overwork and a cold; not by a fall in the cab. This claim was made a very prominent feature of the defense, and was again and again rendered conspicuous in the trial. The jurors understood the precise point, and its significance to the litigants, and every one must have fully comprehended that part of the general charge of the court which was designed to and which, in our opinion, fully covered the proposition embodied in the request, although not in the same language. The court clearly stated, what had been so often admitted by both parties, that the plaintiff, if he recovered at all, could not recover for injuries received at a subsequent time, nor for any injuries except those caused by the giving way of the board or platform, and for no defect except that. The court repeated this language in substance later in its charge, and it contained every thing found in the rejected request, except a direct reference to the witness Burton. This was unnecessary for the information of the jury, for there was no question in the case ¹⁸¹ but that the injuries complained of were those which were received when Burton boarded the locomotive, finished the work, and then assisted plaintiff to his house. The latter so testified, fixing the date as August 29th. Although counsel made a strong effort to show that it was actually in the month of October, and not in August, it is to be noted that nothing of this nature was attempted through the testimony of Burton. He was a witness for the defense, remembered the occasion, but did not testify that it was not on the day alleged by plaintiff. It is obvious that the court did not err in its refusal.

Proceeding to a consideration of the second and third assignments of error, it may be said that after the jury had been out some twelve hours they were brought into the courtroom, and it was announced that no agreement had been reached. The court thereupon addressed them as to the advisability of making further and strenuous efforts in that direction, and again sent them out. They then deliberated about nine hours, and again stated their inability to agree. The court thereupon remarked that it was of importance that a verdict be secured; that, while it had no means of knowing how they stood, if there should be one or two men who were unable thus far to reconcile their views with those held by their associates, it would be worth while for them to consider, in view of the fact that so many jurors equally as honest and of as good judgment took an opposite view, whether they were not mistaken. But they were also told that they were not called upon to surrender conscientious views which they might hold of the case in order to reach a verdict. Further remarks along these lines were made by the court, and the jury again retired. A verdict for plaintiff resulted. Ignoring the point made that no proper exception was taken to any part of this language, we fail to see wherein the court erred. It had the right to urge that efforts should be made to agree, and that, upon a comparison of views, it might be well to consider and heed the judgment of other men. The purport of this instruction was that, if any of the jurors differed in their views of the evidence from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their own judgments, although not required to surrender their own conscientious convictions, and lead them to a re-examination and closer scrutiny of the ¹⁸⁹³ facts in the case for the purpose of revising and reconsidering their preconceived opinions. These instructions were sound, and well adapted to the situation: *Commonwealth v. Tuey*, 8 Cush. 1; *Commonwealth v. Whalen*, 16 Gray, 28; *State v. Smith*, 49 Conn. 376. See, also, *McNulty v. Stewart*, 12 Minn. 434; *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551. The language used by the court below does not come within the scope of the cases cited by defendant, as will be seen upon comparison.

It is contended that the plaintiff was guilty of contributory negligence in continuing to use the footboard in its defective condition, and in not repairing or removing it. That he

could have repaired it himself, or that he could have run the locomotive with it entirely removed, does not demonstrate the correctness of this contention. By a rule of the company employees were required to report defects, or to repair the same themselves. There was a positive injunction to do one thing or the other. The plaintiff claimed that he had complied with this rule by reporting the defect to the proper person, and had been twice assured that it should be repaired. That the plaintiff could have repaired it himself did not relieve the defendant company from the duty imposed upon it to repair when duly notified of the existence of the defect.

It is urged that the verdict was not justified by the evidence. Counsel for defendant company, in support of this position, have analyzed and commented upon certain points in the proofs in a most vigorous and able manner. We are obliged to admit that there is great force in their argument, but we cannot justly say that the verdict was without evidence to support it. The plaintiff's testimony was sufficient to establish his cause of action, and evidently the jury believed him as against the many witnesses produced in opposition. The remarkable circumstances under which one or two of defendant's witnesses testified at the second trial, having been for plaintiff at the first, made this an unusual case, and rendered the trial judge, who had presided at both trials, and the jury, peculiarly well qualified to determine where the truth was, much better than an appellate court. We are compelled to disagree with counsel in their assertion that by the proofs plaintiff's statement concerning his report of repairs needed upon his locomotive and his version of the accident were conclusively shown to be false.

¹⁸³ Finally, although it does not bear on a determination of the case, we feel constrained to say that, in our opinion, counsel for defendant are not at all warranted in assuming that the remark made in the memorandum attached to the order of the court below, refusing a new trial, concerning certain witnesses, was intended to be or is a reflection upon their professional character or integrity. We feel confident that no disinterested person reading the remark would suspect that these gentlemen were thought by the court to be instrumental in procuring the witnesses who at the first trial had testified in behalf of the plaintiff to bear false witness against him upon the second; and we are equally as certain that the careful, conscientious, and learned trial judge who

penned this remark would be among the last to reflect, intentionally or inadvertently upon the good name and fame of respectable gentlemen. He had presided at both trials, had seen these self-confessed perjurers when testifying on both occasions, and expressed an opinion as to when they falsified. From what he said it could not be inferred that he charged corrupt practices upon the defendant or its attorneys. Nothing of that nature could reasonably be implied.

Order affirmed.

INSTRUCTIONS ALREADY COVERED NEED NOT BE REPEATED: *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 394, and note; *Spokane Truck etc. Co. v. Hoefler*, 2 Wash. 45; 26 Am. St. Rep. 842; *Cincinnati etc. R. R. Co. v. Cooper*, 120 Ind. 469; 16 Am. St. Rep. 334.

A VERDICT WILL NOT BE DISTURBED ON APPEAL if there is any evidence to support it: *Bohannon v. Combs*, 97 Mo. 446; 10 Am. St. Rep. 328, and note.

MARTIN v. HORNSBY.

[55 MINNESOTA, 187.]

BOND SIGNED BY SURETIES ALONE IS INVALID.—The sureties on the bond of one about to be appointed a notary public are not bound by its conditions if the principal has failed to sign it, whether the bond is joint, or joint and several.

BOND—SURETIES—ESTOPPEL.—If the bond of a notary public is executed by sureties who manifestly do not intend to be bound without their principal, and they do not deliver the bond, or consent to its delivery, or even know of its delivery without the principal's signature, and they do nothing to estop themselves, they cannot be held liable. Especially is this true if the statute contemplates that the bond shall be signed by the appointee as principal.

DEFENDANT Hornsby in June, 1892, represented to the plaintiff that he was the agent of Antonio Wortman to sell for her a certain piece of real property. He delivered to plaintiff a deed purporting to have been signed by her, on which he, as such notary public, certified under his hand and official seal that she appeared before him on June 20, 1889, and acknowledged that she executed the deed freely and voluntarily. Plaintiff paid Hornsby six hundred dollars for the property, but discovered afterward that Mrs. Wortman never signed the deed or acknowledged the execution of it, or received the money, and that Hornsby never was her agent or authorized by her to sell the property. Hornsby disappeared, and plaintiff obtained leave, under the statute,

to bring this action in his own name upon the notary's bond to recover his six hundred dollars of the sureties. The notary's appointment was made in August, 1885, for the period of seven years, but the bond had never been signed by the principal. The jury were instructed to return a verdict for defendants. Plaintiff moved for a new trial, and appealed from the order denying his motion.

H. H. Herbst, for the appellant.

Charles N. Bell and George E. Budd, for the respondents.

¹⁸⁹ COLLINS, J. The question of law presented in this appeal is whether the sureties named in, and who signed, an instrument designed to be the bond required, under the General Statutes of 1878, chapter 26, section 2, of a person about to be appointed a notary public, are bound by its conditions when the principal has failed to sign the same. The instrument purported to be the joint and several obligation of "A. H. Hornsby as principal, and U. L. Lamprey and Chas. W. Clark as sureties." It was conditioned that "the above-bounden A. H. Hornsby" should faithfully discharge the duties of a notary. Through inadvertence in the office of the chief executive the failure on the part of the principal to sign the purported obligation was overlooked. It was approved and a commission issued.

The statute above referred to clearly contemplates the execution of a bond, with the appointee as the principal, and with sureties; and this is more apparent when we read, in connection, the first three sections of the General Statutes of 1878, chapter 78, which authorize and provide for the bringing of actions upon official bonds. So the bond in question was not executed in compliance with the law, but was unfinished and incomplete. Speaking of a somewhat similar instrument, this court said, in *State v. Austin*, 35 Minn. 51, that: "Upon its face, the bond appears to be incomplete. It was not the ¹⁹⁰ obligation of the principal named. It did not, so far as appears, bind the sureties, because, as appears from the instrument, the obligation which they assumed was that of sureties for another, who was to be the principal obligor. It was not, therefore, of effect, as the bond of even those who executed it." This language is in point here, and, in addition to cases there noted, attention may be called to *Curtis v. Moss*, 2 Rob. (La.) 367; *Board of Education v.*

Sweeney, 1 S. Dak. 642; 36 Am. St. Rep. 767, and cases cited. *Prima facie*, the instrument now being considered was incomplete and invalid, and was not binding upon those who signed it as sureties. Nor can we see that a distinction can be drawn between bonds which are simply joint and those which are joint and several, as was that in controversy. The doctrine upon which all of the cases before referred to are rested will not admit of such a distinction, nor is it suggested in the leading case on the other side cited by counsel for appellant: *Trustees of Schools v. Sheik*, 119 Ill. 579; 59 Am. Rep. 830.

This brings us to a consideration of the only remaining point. It was remarked in the Austin case that "it may be that persons executing such an instrument, which, upon its face, appears to be incomplete, may, by their own conduct, subject themselves to liability thereon, or become estopped from questioning the completeness of the instrument."

Of course no one can doubt that if sureties see fit to bind themselves absolutely, in any manner, without the signature of the principal, although named as such in the bond, they may do so, precisely as sureties may bind themselves although one of their number named as such in the obligation has refused to sign it, as was the case in *Van Norman v. Barbeau*, 54 Minn. 388. So we now have to inquire whether, by their conduct, these sureties have in any way concluded themselves from denying a liability upon the instrument which they signed. From the evidence it appears that a printed note of instructions was appended to the blank bond. By this the applicant for appointment was informed that the bond must be signed by himself as principal, with at least two sureties. Hornsby was a real estate dealer, and requested Lamprey and Clark to become sureties upon the bond in question, informing each that the other had agreed so to do. At his request Clark went to Lamprey's office, where the blank was. Clark there wrote, in the body ¹⁹¹ of the bond, the three names "A. H. Hornsby," "U. L. Lamprey," and "Chas. W. Clark," as they appear in the first quotation herein. Hornsby was not present. Clark signed the instrument in the presence of a notary public then in Lamprey's employ, and went away, leaving it with the notary. Shortly before or after this Lamprey signed the bond in the presence of Hornsby and the notary, at the same time calling Hornsby's attention to the requirements, as contained in the

appended note, stating to him that he must sign it as principal, and that without his signature it would be worthless. Lamprey, being called away, immediately left his office. Both of these sureties expected that the bond would be signed by Hornsby as principal, and to some extent relied upon their knowledge of the custom respecting such bonds and the manner in which they were usually required to be executed. They knew nothing of a delivery of this instrument, nor did they know of its incomplete and unfinished condition until after the transaction out of which came this litigation. On these facts we are unable to see how the sureties have precluded themselves from asserting the invalidity of the obligation. There was no conduct on their part which should prevent them from taking advantage of the incompleteness of the bond, or which should estop them from insisting that there was no contract on which they are liable.

It is the admitted fact that both of these sureties had more or less knowledge, later on, that Hornsby was acting as a notary public, but, as before stated, they were not informed of his delivery of the bond without having signed it as principal. Had they been so informed, and then allowed him to exercise the duties of a notary, it is possible that they might not have escaped the consequences of his misconduct.

We think it manifest, from the whole case, that the sureties did not intend to be bound on the instrument unless it was also executed by the principal named therein, nor was it the intention of the chief executive of the state to accept it without such execution, and, further, that the sureties have not precluded nor estopped themselves from taking advantage of the omission.

Order affirmed.

OFFICIAL BONDS—FAILURE OF PRINCIPAL TO SIGN—LIABILITY OF SURETY. The failure of a principal to sign his official bond conditioned for the faithful performance of his official duty does not render it void or release the surety from liability thereon: *City of Deering v. Moore*, 86 Me. 181, 41 Am. St. Rep. 534, and note. *Contra: Board of Education v. Sweeney*, 1 S. Dak. 642; 36 Am. St. Rep. 767, and note; *Weir v. Mead*, 101 Cal. 125; 40 Am. St. Rep. 46, and note discussing the conflict of authority.

MERCHANTS' NATIONAL BANK OF CROOKSTON v.
STANTON.

[55 MINNESOTA, 211.]

FIXTURES—BUILDINGS ON ANOTHER'S LAND.—It is entirely competent for parties to agree that buildings shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected.

FIXTURES—BUILDINGS ON ANOTHER'S LAND.—If buildings are constructed on land by one having no estate therein, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person erecting them will be implied, in the absence of any facts or circumstances tending to show a different intention.

FIXTURES — BUILDINGS ON ANOTHER'S LAND—MORTGAGES. — If buildings are constructed on mortgaged land by one having no estate therein, and hence no interest in enhancing its value, by the permission or license of the mortgagor in possession, between whom there is an agreement that the buildings shall be the personal property of the one constructing them, the absence of a concurrent agreement on the part of the mortgagee, to the same effect, does not, of itself, make the buildings a part of the mortgage security.

FIXTURES ANNEXED SUBSEQUENT TO MORTGAGE — COMMON-LAW RULE INAPPLICABLE.—The old rule that all fixtures annexed subsequently to the execution of a mortgage, whether by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became as to the mortgagee a part of the realty, is repudiated as inapplicable in states where a mortgage is a mere security, conveying neither title nor right to possession. The old rule was founded upon the common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will.

MARSHALING SECURITIES—PRIMARY FUND FOR PAYMENT OF MORTGAGE.—If the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchaser took *cum onere*, the portion so remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation.

MARSHALING SECURITIES—HOMESTEAD—MORTGAGES.—If a man and wife execute a mortgage on their homestead and other lands, and afterward voluntarily convey, with covenants of warranty, a portion of the mortgaged premises, the land remaining, although the homestead, becomes the primary fund for the payment of the mortgage, as they have no equitable right to insist that their homestead shall be protected to the displacement of this countervailing equity of their grantee.

ACTION to foreclose a mortgage. Defendants Dobson and Martin alone appealed—Martin, because his chattel mortgage was held not to be a lien on the mill and machinery mentioned in the opinion, and Dobson, because his home-

stead was decreed to be sold for the advantage of the mortgage to the bank.

A. A. Miller, for the appellants.

John Cromb and A. C. Wilkinson, for the respondent.

²¹⁷ **MITCHELL, J.** The real issues in this case are somewhat obscured by the prolixity of the stipulated facts (adopted by the trial court as its findings), which contain much that was unnecessary for the determination of the case in the court below, and still more that is immaterial in the decision of any question involved in this appeal.

The primary object of this action was to foreclose a mortgage, and the principal question in the case is whether a certain building and the machinery therein situated on the mortgaged premises was, as between the plaintiff and defendants Dobson and Martin, the personal property of the latter, or a part of the realty, and hence covered by plaintiff's mortgage.

The short facts, so far as material to that question, are as follows: Defendant Stanton executed to plaintiff the mortgage in suit on his own real estate to secure the joint debt of himself and defendant Dobson. Subsequently Dobson, "with the knowledge and consent" of Stanton, erected and put on the mortgaged premises the building and machinery referred to at his own sole expense, and mainly with money loaned to him by defendant Martin, to whom, as security for its repayment, he executed a bill of sale and chattel mortgage on the building and machinery. The building was a large, two-story frame structure designed for "an oatmeal mill," with a one-story brick addition for an engine and boiler room, in which were placed machinery suitable to manufacture oatmeal, and an engine and boiler, pulleys and shafting, sufficient to operate the same. This machinery was of the kind usually put in oatmeal mills, and was placed in and attached to the building in the usual way, some of it being screwed to the floor of the building, and some of it bolted to framework which was fastened to the floor, and ²¹⁸ some of it held in position by its own weight, and all of it operated by shafting and belting, with power furnished by the engine and boiler.

There is no doubt but that such a building and machinery would, in the absence of any agreement of the parties to the contrary, become a part of the realty, and belong to the

owner of the soil. *Prima facie* all buildings belong to the owner of the land on which they stand as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property. If erected wrongfully, or without such agreement, they become the property of the owner of the soil. But it is entirely competent for the parties to agree that they shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected. The trial court has made no direct or express finding as to whether there was any such agreement between Dobson and Stanton, and the question here is (first treating the case as if the controversy was between them) whether the facts found establish *prima facie* an implied agreement for separate ownership of the building and machinery. The fact that Stanton had mortgaged this property to secure a debt owing by Dobson as well as himself, has no bearing upon the question in hand. That fact would not render it to Dobson's interest to expend his own money for the benefit of the land. Neither does the fact that the building was erected with money furnished to Dobson by Martin affect the question. Hence, reducing the facts found to their lowest denomination, they amount to just this: Dobson, who had no estate in the land, erected the mill at his own expense on the land of Stanton, "with the knowledge and consent" of the latter. The court did not find, and the stipulated facts do not disclose, a single other fact bearing on the question of the intention or implied agreement of the parties. The finding does, however, amount to one that the building was erected by permission and license from Stanton. At first we entertained some doubt whether this alone was sufficient to establish an implied agreement for separate ownership. Such an implication would not be drawn when a different intention of the parties is indicated by the terms of any express agreement between them on the subject, or when a different intention is ²¹⁹ to be inferred from the interest of the party making the erections or from his relations to the title of the land.

But we have arrived at the conclusion that, where the erections are made by one having no estate in the land, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person making them will be

simplified, in the absence of any other facts or circumstance tending to show a different intention. This seems to us a reasonable doctrine, and one supported by the authorities, although we admit that in all the cases we have examined, including our own case of *Little v. Willford*, 31 Minn. 173, there were always some other facts or circumstances in evidence bearing upon the question of the intention of the parties. Indeed it would be difficult to conceive of any case where this would not be the fact if all the circumstances bearing on the question were fully in evidence. The present case comes up in the peculiar shape it does, because submitted on stipulated facts probably more or less incomplete: See *Howard v. Fessenden*, 14 Allen, 124-128; also *Prince v. Case*, 2 Am. Lead. Cas., 5th ed., 562.

We are therefore of opinion that the facts found establish *prima facie* an implied agreement between Dobson and Stanton for separate ownership of this building and machinery, and hence that, at least as between them, they would have remained the personal property of Dobson.

But plaintiff contends that, to render it personal property as to it, it should have been a party to the agreement to that effect; and that, in the absence of any such agreement on its part, its rights must be determined by the rule which obtains between mortgagor and mortgagee, which is that all fixtures annexed to the land by the mortgagor become part of the mortgage security; and that the mortgagor could not give to a tenant or licensee a right which he himself did not possess.

Independently of any technical grounds there are manifestly good reasons why this should be the rule as to the mortgagor himself, for, being the owner of land, and presumably looking to its redemption, it must be presumed that what he adds to it is for the benefit of his own estate, which he can always save by redeeming the premises.

320 It undoubtedly was formerly the rule that all fixtures annexed subsequently to the execution of the mortgage, whether annexed by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became, as to the mortgagee, a part of the realty. But this rule was founded upon the old common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will.

This is still the rule in those states—notably Massachusetts—which adhere to the doctrine that a mortgage is a conveyance. But the reasons for the rule have no application where, as in this state, a mortgage is a mere security, and neither conveys the title nor gives any right to the possession. Hence in those states where a mortgage is, as with us, a mere security, there is a general tendency to repudiate the old rule as inapplicable, and to hold that, as to fixtures placed on the mortgaged premises subsequently to the execution of the mortgage, there is no absolute presumption that they were annexed for the benefit of the realty, and that, where the intention or agreement of the mortgagor and the party making the annexation was that the thing annexed should not become part of the realty, the absence of a concurrent agreement to that effect on part of a prior mortgagee will not, of itself, make the annexation a part of the mortgage security. This would seem just, for, the annexation not having been made when he took his mortgage, he has not been misled, or advanced any thing on the faith of it, and hence ought not to be permitted to avail himself of it as a part of his security, contrary to the intention of the party making the annexation: *Crippen v. Morrison*, 13 Mich. 23; *Davenport v. Shants*, 43 Vt. 546. See, also, *Tift v. Horton*, 53 N. Y. 380; 13 Am. Rep. 537.

We are therefore of opinion that, upon the facts presented by the record, plaintiff has no better or greater right to these annexations than Stanton would have.

Certain questions arise as to the correctness of the directions of the court as to the order in which the premises covered by the several mortgages of the parties should be sold, and as to the distribution of the proceeds. As only Dobson and Martin appeal, their rights alone can be considered, and the rights of the other defendants ²²¹ are material only so far as they bear upon the rights of the appellants. The material facts are as follows: Dobson owned three tracts of land, which, for convenience, we will call tracts A, B, and C, a part of C being his homestead.

He and his wife executed: 1. A mortgage on A; 2. A mortgage on both A and B; and 3. A mortgage on C (including his homestead), as additional security for the same debt secured by the second mortgage. All of these mortgages are now held by the defendant Martin. Subsequently to the execution of these mortgages Dobson and wife conveyed these

tracts by warranty deed in the following order of time: 1. Tract A to defendant Stanton, who then executed thereon to plaintiff the mortgage now being foreclosed; 2. Tract B to defendant Cunningham; 3. All of tract C, except their homestead, to defendant Palmer.

In this action the plaintiff asks for the foreclosure both of its own mortgage and of the three Martin mortgages, and that the lands covered by all of them be sold, and the proceeds applied according to rights of the several parties. If seasonably objected to, perhaps all of this could not be done in this action, but none of the defendants objected to it, and defendant Martin, in his answer, unites with plaintiff in asking that it be done.

In its judgment the trial court, after directing that all four mortgages be foreclosed, and all the property covered thereby be sold, further directed, among other things: 1. That all of the proceeds of the sale of tracts B and C be applied on Martin's second and third mortgages (which may be treated as one, being security for the same debt), before applying thereon any of the proceeds of tract A; 2. That the several lots constituting tract C be sold separately, and that the lot constituting Dobson's homestead should only be sold in case the other property covered by the second and third mortgages did not bring enough to satisfy the debt secured thereby.

The first of these directions was intended, in the interest of plaintiff's mortgage, to marshal the securities so as to require Martin to exhaust the other property covered by his mortgages before resorting to tract A, on which alone plaintiff had a lien. Defendant Martin urges that marshaling of assets or securities is only admissible between creditors of the same common debtor, to whom both ²²² funds or securities belong. To this general rule there are some apparent exceptions, which, however, are within its spirit. For example, it will be allowed between creditors of different persons where it appears that the debtor whose estate is sought to be charged is primarily liable, and this for the same reason that subrogation may be admitted where the two securities belong to different persons if the fund not taken be one which in equity is primarily liable. Proceeding on the same principle is the equity rule that, if the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchasers took *cum onere*, the portion so

remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation. This is exactly this case. Stanton could have insisted on the application of this rule, and plaintiff, his mortgagee, stands, in that regard, in his shoes.

The application of this same principle fully disposes of Dobson's contention that his homestead should not have been sold until all the other property covered by the Martin mortgages, including tract A, had been exhausted. In *McArthur v. Martin*, 23 Minn. 74, we held that where A held a mortgage on two tracts of land, one of which was the homestead of the mortgagor, and B held a judgment against him which was a lien only on the other tract, A would not be compelled to resort to the homestead first in order to leave the other tract as far as may be to B. This was upon the ground that to apply the rule in reference to marshaling securities in favor of a judgment creditor, who obtains his lien by proceedings *in invitum*, and not by contract of his debtor, would be but an indirect method of subjecting a homestead to the payment of debts; that, under such circumstances, a judgment creditor has no equity as against the homestead right of the debtor and his family. But where, as in this case, the mortgagor and his wife have voluntarily conveyed, with covenants of warranty, a portion of the mortgaged premises, they have no equitable right to insist that their homestead shall be protected, to the displacement of the countervailing equity of their grantee that the portion of the mortgaged premises retained by them shall be the primary fund for the payment of the mortgage. In the absence of legislation or of express agreement to that effect ²²³ the courts are not warranted in interpolating any such stipulation into the contracts of parties.

The seventh conclusion of law of the trial court is also assigned as error. Taken literally, it might seem to mean that the court directed the payment to plaintiff of the proceeds of property not covered by its mortgage. The court certainly could not have intended this; and, if the language implies that, it was doubtless an inadvertent verbal inaccuracy, which the court would, and still will, correct upon attention being called to it.

Upon the appeal of Dobson, the judgment is affirmed, and, upon the appeal of Martin, that part of the judgment which adjudges that the mill and machinery referred to are a part

of plaintiff's mortgage security, is reversed, and a new trial of that issue only is ordered.

FIXTURES—BUILDINGS ON ANOTHER'S LAND.—The character of property as real or personal may be fixed by contract with the owner of realty when the article is placed in position, but such contract cannot affect the rights of a mortgagee or innocent purchaser without notice: See *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163; 39 Am. St. Rep. 166, and note. A building erected upon the land of another by the latter's permission, upon an agreement that it may be removed at the pleasure of the builder, is personal property if no intervening rights have accrued: *Ingalls v. St. Paul etc. Ry. Co.*, 39 Minn. 479; 12 Am. St. Rep. 676, and note; *Laird v. Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564, and note; note to *Hopewell Mills v. Taunton Sav. Bank*, 15 Am. St. Rep. 239. In the absence of an agreement it is otherwise: *Kingsley v. McFarland*, 82 Me. 231; 17 Am. St. Rep. 473, and note. The intention of the parties and the uses to which a thing is put are material factors in determining whether it is a fixture: *Lansing Iron etc. Works v. Walker*, 91 Mich. 409; 30 Am. St. Rep. 488, and note; *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471. If a building is put upon mortgaged land by the consent of the mortgagor, and without the consent of the mortgagee, it becomes a part of the realty, and is covered by the mortgage, and this result cannot be averted by any agreement to which the mortgagee is not a party. One who purchases the property at a sale under the mortgage acquires title to the building, though notified at the sale of the claims of another thereto: *Meagher v. Hayes*, 152 Mass. 228; 23 Am. St. Rep. 819.

FIXTURES—AGREEMENT.—The owner of land can, by express agreement, reimpress the character of personalty upon fixtures which have become such by annexation to his land: *Laird v. Railroad*, 62 N. H. 254; 13 Am. St. Rep. 564, and note. A structure erected on land for a use which does not enhance the value of the land remains a chattel: *Atchison etc. R. R. Co. v. Morgan*, 42 Kan. 23; 16 Am. St. Rep. 471.

FIXTURES—AGREEMENT—MORTGAGEE'S NOTICE.—An agreement between a landowner and one affixing chattels to the land that such chattels shall retain their character of personalty is efficacious between the parties thereto, and in some of the states is equally effective against prior mortgagees and against subsequent purchasers or encumbrancers having notice thereof: *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 889. That such a contract cannot affect the rights of a mortgagee or innocent purchaser without notice, see note to *Fifield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172.

MARSHALING SECURITIES.—The court has no authority to impose upon the homestead a greater burden than has been placed thereon by the parties themselves, or by the law: See note to *Miller v. McCarty*, 28 Am. St. Rep. 379.

AT COMMON LAW A MORTGAGE OF REAL ESTATE is regarded as a conveyance in fee, a transfer of the legal title, leaving in the mortgagor only a right to redeem: See monographic note to *Cotton v. Carlisle*, 7 Am. St. Rep. 31-34, discussing the nature of the mortgagor's estate at common law, and the remedies available to him to recover possession, or otherwise obtain his rights by suit or action.

SLOCUM v. BRACY.

[55 MINNESOTA, 249.]

CONTRACTS—VENDOR AND PURCHASER—DEED—MERGER.—If a deed is accepted as performance of a contract to convey real estate, the contract is merged in the deed which alone determines the rights of the parties, though it varies from that stipulated for in the contract, as where the deed of a third party is accepted in lieu of the vendor's deed. If the deed accepted contains no covenants the grantee cannot, in the absence of fraud or mistake of fact, recover back the consideration paid, even on failure of title.

VENDOR AND PURCHASER—CONTRACT TO CONVEY—DEED—EVIDENCE.—If, in performance of a contract to convey real estate, the deed of a third party is given instead of the vendor's deed, the burden is upon the vendor to prove that it was accepted, not merely as a conveyance, but in performance of his contract. But the vendee may prove by parol that his acceptance of the deed as performance was only conditional, as such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms. The burden of proving any condition attached to the acceptance is upon the vendee.

THE action was, on defendants' motion, dismissed in the lower court, after a trial of the issues, on the ground that no damages had been proved. Plaintiff appealed from an order denying his motion for a new trial.

Fletcher, Rockwood & Dawson, for the appellants.

Edgerton & Maclay, for the respondent.

252 MITCHELL, J. This was an action to recover the consideration paid for land which defendants contracted to convey to plaintiffs by "a good and sufficient deed, free of all encumbrances," but which it is alleged they had failed to convey, and were unable to convey, by reason of want of title.

Stripped of immaterial matter, the answer was that defendants had performed by procuring a quitclaim deed of the land to plaintiffs from a third party whose title "rested upon final receipts of the receiver of the United States land-office," which deed plaintiffs had accepted as full performance of defendants' contract.

The reply admitted the execution of this quitclaim deed, but denied that plaintiffs had accepted it as performance of the contract, and alleged that, at the time of the execution of the deed, it was agreed between plaintiffs and defendants that "it should not be deemed performance of the contract,

except in the event that a patent for the land should be issued by the government"; that the entry of the land was canceled by the government, and hence no patent issued, by reason whereof there was an entire failure of title.

No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is *functus officio*, and the rights of the parties rest thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract, as where the vendee accepts the deed of a third party in lieu of the deed of his vendor; and as, in the sales of land, the law remits ²⁵³ the party to his covenants in his deed, if there be no ingredient of fraud or mistake in the case, and the party has not taken the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title. What is said in *Donlon v. Evans*, 40 Minn. 501, seems to conflict with this doctrine, but this question was not involved in that case. The complaint alleged false and fraudulent representations as to the title of the grantor in the deed. The court found this allegation to be true, and the evidence abundantly sustained the finding. This fraud was the real gist of the cause of action in that case.

The deed of a third party not being what the executory contract called for, the burden was on the defendants, as the trial court correctly held, to prove that plaintiffs accepted the deed in performance of the contract. But it was not necessary to prove that plaintiffs expressly agreed, in so many words, to accept it as performance; the fact might be proved by the acts of the parties, and other circumstantial, but equally persuasive, evidence.

The evidence is conclusive that this quitclaim deed was executed and unconditionally delivered to plaintiffs with reference to this executory contract; also that plaintiffs accepted it as a conveyance with reference to that contract and in lieu of a deed from the defendants, and then proceeded to settle and close up the transaction on that basis. This certainly made out at least a *prima facie* case for the defendants that the deed was accepted in performance of the contract. If there were any conditions attached to this acceptance the burden was then cast on plaintiffs to prove it.

There would be a very clear distinction (apparently not fully kept in mind by counsel) between plaintiffs merely ac-

cepting the instrument as a conveyance and their accepting it as performance of defendants' contract.

We therefore think that it would have been competent for plaintiffs to have proved by parol the allegation of their reply that their acceptance of the deed as performance of defendants' contract was only conditional. Such evidence would not contradict the terms of the deed, or tend to prove that it was not to be operative as a conveyance according to its terms. But the defect in plaintiffs' case is that they produced no sufficient evidence to rebut defendants' evidence that the deed was accepted as performance of the executory ²⁵⁴ contract, or to show that there was any such condition attached to its acceptance, or such as is alleged in the reply.

The only evidence offered having the least tendency in that direction was that, after the entry of the land was canceled, the defendants made some attempts to get a rehearing before the secretary of the interior, in order to get the entry reinstated. While this fact might be of some weight as corroborative of some other and better evidence, yet, standing alone, it amounted to nothing.

Therefore, in our opinion, the evidence as it stood conclusively showed that plaintiffs accepted this quitclaim of a third party as performance of defendants' executory contract to convey, and hence, there being no element of fraud or mistake in the transaction, they were not entitled, under the rules of law already referred to, to recover the consideration paid because of failure of title. On this ground the action was properly dismissed, and whether the trial court assigned the right reason is not material.

Order affirmed.

MERGER OF CONTRACT OF SALE IN DEED.—The general rule is that all articles of agreement for the sale of land are merged in and extinguished by a subsequent deed thereof between the parties. The agreement becomes a nullity, and the rights of the parties are controlled by the deed: See monographic note to *Clifton v. Jackson Iron Co.*, 16 Am. St. Rep. 622-624, discussing the subject; *Kerr v. Calvit*, Walker, 115; 12 Am. Dec. 537; *Hunt v. Amidon*, 4 Hill, 345; 40 Am. Dec. 283; *Timms v. Shannon*, 19 Md. 296; 81 Am. Dec. 632. *Contra*, *Speed v. Hann*, 1 T. B. Mon. 16; 15 Am. Dec. 78. But a parol contract by a vendor to refund the purchase money on a failure to give title, and to repay all costs and expenses incurred, is not merged in a deed subsequently executed, with a covenant of special warranty, but no covenant of title. Such contract survives the deed, and confers an independent cause of action, enforceable upon a failure of the title: *Closs v. Zell*, 141 Pa. St. 390; 23 Am. St. Rep. 296.

GILBERT v. EMERSON.

[55 MINNESOTA, 254.]

RIPARIAN RIGHTS ON SHORE AND WATER LOTS.—The right of the riparian proprietor upon navigable waters to reclaim, improve, and occupy submerged lands out to the line of navigability may be separated from the riparian right in the shore land, and be transferred to, and enjoyed by, persons having no interest in the original shore.

RIPARIAN RIGHTS—INTENTION OF GRANTOR.—The rights granted by one who plats and sells his land fronting on navigable water, where there is submerged land lying between the shore and point of navigability, depend upon the question of the grantor's intention in making the conveyance.

RIPARIAN RIGHTS—RESERVATION OF PROPRIETARY RIGHTS IN CONVEYANCE NOT PRESUMED.—If a party conveys a parcel of land bounded by water it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance.

THE PLATTING AND SALE OF WATER LOTS IN SHALLOWS lying between the shore and point of navigability in navigable waters manifestly contemplates reclaiming them, and filling them in, or otherwise improving them for use.

RIPARIAN RIGHTS AND TITLE TO LAND BOUNDED BY NAVIGABLE WATERS—CONVEYANCES—WATER LOTS.—If the owner of land fronting on a bay plats it into blocks and streets, extending the plat several blocks beyond the shore line, out into the shallow water, but not out to the line of navigability, and then conveys, according to the plat, the original shore block to one person and all the water blocks in front of it to another person, the plat shows, on its face, an intention that the outermost platted blocks shall be deemed the shore blocks, with all the riparian rights in the water, and land under the water, in front of them usually incident to a riparian estate. Hence, after the owner's conveyance of these water blocks he has no proprietary interest in the unplatted space in front of them. Neither does the grantee of the original shore block acquire any appurtenant riparian rights in the unplatted space between the outermost platted blocks and the line of navigability. His rights are limited to the lines of the original shore block as indicated on the plat.

APPEAL by the plaintiff from a judgment decreeing that he was not, and that the defendant Howe was, the owner of the unplatted submerged land in controversy. Appeal, also, by defendants Emerson and Eldridge from the same judgment decreeing that they had no title, estate, or interest in the same submerged land. Both appeals were argued together.

Billson & Congdon, for the appellant Gilbert.

Edward Fuller, for the appellants Emerson and Eldridge.

William B. Phelps, for the respondent, Howe.

259 MITCHELL, J. This is another of the familiar series of controversies over titles and riparian rights, growing out of

the fact that Orrin W. Rice, the original owner of a peninsular fronting on the waters of the bay of Duluth, known as "Rice's Point," in platting his land into lots, blocks, and streets, extended the plat for a distance of several blocks beyond the shore line out into the shallow water: *Gilbert v. Eldridge*, 47 Minn. 210; *Bradshaw v. Duluth Imp. Mill Co.*, 52 Minn. 59.

Rice did not, however, plat out to the line of navigability, and hence an unplatted space was left between the outermost blocks and the navigable waters. It is this unplatted space which is the subject of the present controversy.

After platting the land Rice conveyed the original shore block (85) to the grantors of defendants Emerson and Eldridge, and conveyed to the grantors of plaintiff all the water blocks in front of block 85, including those fronting on the unplatted space referred to. Years afterward Rice's heirs conveyed the unplatted space to the defendant Howe.

Plaintiff claims the right to occupy this unplatted space by virtue of his ownership of the outermost blocks fronting on it, his contention being that the plat clearly shows on its face that it was intended that these blocks should permanently enjoy access to the water; in short, that they should be the "shore blocks," and that, ^{see} as such, the riparian rights usually appurtenant to the shore land should attach to them.

Defendants Emerson and Eldridge claim the right to the unplatted space as appurtenant to their ownership of the original shore block, their theory being that the riparian rights originally incident to the shore land were curtailed by the plat only as to the land covered by the platted blocks, thus leaving still incident to the original shore block the unplatted space out to the point of navigability.

Defendant Howe bases his claim upon the deed from Rice's heirs, upon the theory that, where a riparian owner extends the plat of his land out into the adjacent shallow water, he still retains, after selling all his platted water blocks, the right to improve, as against his grantees, all that lies beyond the boundaries of the plat out to the line of navigability.

It is the settled doctrine of this court that the right of the riparian proprietor upon navigable waters to reclaim, improve, and occupy submerged lands out to the line of navigability may be separated from the shore line, and transferred to and enjoyed by persons having no interest in the original

shore. We have also held, with reference to this very property, that platting the land into separate and distinct parcels or blocks, out into the shallow water beyond, in front of the shore block, clearly indicated an intention to disassociate the two, and hence that the grantee of the shore block would acquire no interest in the water blocks in front of it. This is conclusive against the claim of defendants Emerson and Eldridge, for if the platting in that way indicated an intention that the grantee of the original shore block should have no right in the water, or the land under the water, included in the platted blocks in front of it, it with equal or even greater force negatived any intention that he should have any rights in the water or land under it outside of the intervening platted blocks, which he could not, under the circumstances, use as incident to the original shore block. In brief, the intention is clearly indicated that the rights of the grantee of that block were to be limited by the boundary lines as indicated on the plat.

We have never before had occasion to directly pass upon the exact question at issue between plaintiff and defendant Howe; but we ²⁶¹ think that an application of the principles announced in our former decisions necessarily leads to its determination in favor of the contention of the plaintiff.

The principle on which all our decisions on the subject have proceeded is that the question is one of intention, as indicated by the plat, with reference to which all the conveyances were made. This plat, as we think, clearly implies that the outermost platted blocks should be and remain the riparian or shore blocks, and, as such, have all the riparian rights in and to the water, and the land under the water, in front of them, which any riparian or shore estate has. This would be the impression which would be inevitably produced on the mind upon a mere inspection of the plat.

Where a party conveys a parcel of land bounded by water it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance; and the mere fact that the boundary of the lot conveyed is indicated by a line on the plat will not limit the grant to the lines on the plat, or operate to reserve to the grantor proprietary rights in front of the lot: *Watson v. Peters*, 26 Mich. 508. Had the blocks conveyed to plaintiff been original shore blocks (with no block platted out in the water in front of

them), or had Rice, before conveying these outermost water blocks, reclaimed and filled them up, there could have been no question but that the grantees would have acquired all the riparian rights in the water, and land under water in front of them, usually appurtenant to shore land.

But the platting of these water blocks, and conveying them with reference to the plat, manifestly contemplated reclaiming them and filling them in, or otherwise improving them for use; and we cannot see what difference it makes whether this had been done before Rice conveyed or was only in contemplation. It seems to us that the plat contemplates upon its face, as clearly as words could express it, that the exterior line of these outermost blocks was to be treated as the shore line, and that the rights usually appurtenant to a riparian estate would attach to those blocks. All the supposed legal objections to this view are more speculative and specious than practical or sound.

262 On the appeal of defendants Emerson and Eldridge, that part of the judgment appealed from is affirmed, and on the appeal of plaintiff that part of the judgment appealed from is reversed, and the cause remanded, with directions to the court below to render judgment in favor of plaintiff.

RIPARIAN RIGHTS—CONVEYANCES—WATERS AS BOUNDARIES—TIDE FLATS OR WATER LOTS.—The right to reclaim, improve, and occupy submerged lands out to the point of navigability, although incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. So improvements may be severed from the uplands, and be held by other persons having no interest in the original tract: See monographic note to *Miller v. Mendenhall*, 19 Am. St. Rep. 233, discussing the rights of landowners in navigable waters fronting their lands, and in the lands under such waters. The riparian owner in making a conveyance may reserve the land under water, but, if the owner of a city lot conveys it with the waters of a navigable stream as a boundary, he will not be presumed to have reserved to himself property rights in front of the land conveyed, which he may grant to others for private occupation, or which he may so use himself as to cut off his grantee from the privileges and conveniences which appertain to the shores of navigable waters. On the contrary, the general presumption is, that the purchaser's title extends as far as the grantor owns: See monographic notes to *Allen v. Weber*, 27 Am. St. Rep. 57, discussing waters as boundary lines, and *Miller v. Mendenhall*, 19 Am. St. Rep. 233. The owner of tide flats or water lots may convey them without the uplands, or he may convey the upland without the flats: See note to *Miller v. Mendenhall*, 19 Am. St. Rep. 234.

BEAUCHAINE v. MCKINNON.

[55 MINNESOTA, 313.]

JUDGMENT—OFFICIAL BOND—EVIDENCE—SURETIES.—A judgment recovered against the principal upon an official bond, for official misconduct, is *prima facie* evidence against the sureties in an action against them on the bond

ACTION against the sureties on a sheriff's bond, conditioned for the faithful performance of his duties. The plaintiff, Beauchaine, had recovered a judgment against the sheriff for wrongfully levying certain writs of attachments on the property of a stranger to the proceedings. Plaintiff then sued the sureties, after an execution on his judgment had been returned unsatisfied, and on the trial offered in evidence the judgment-roll in his action against the sheriff, together with the writ of execution and return thereon. This evidence was admitted. Plaintiff obtained judgment, and defendants appealed from an order refusing to set aside the verdict and to grant a new trial.

A. A. Miller and Martin O'Brien, for the appellants.

Edward George, for the respondent.

320 COLLINS, J. The real questions involved in this appeal are whether in an action brought against sureties in an official bond, given by a sheriff, and conditioned for the faithful performance of the duties of his office (Gen. Stats. 1878, c. 8, sec. 193), a judgment which has been rendered 321 against such sheriff for official misconduct is admissible in evidence, and also, if it be admissible, to what extent are the sureties bound. A great number of decisions have been cited upon the subject, and there is much diversity of opinion as to the effect of such a judgment. In some of the states it is held that it is of no value as against sureties, and hence inadmissible in evidence in an action brought to enforce a liability upon the bond: *Pico v. Webster*, 14 Cal. 203; 73 Am. Dec. 647; *Lucas v. Governor*, 6 Ala. 826; *Governor v. Shelby*, 2 Blackf. 26; *Carmichael v. Governor*, 3 How. (Miss.) 236. It is well argued in these cases that such a judgment is *res inter alios acta*, and therefore of no effect in an action against sureties. In a very large number of states it has been determined that such a judgment is *prima facie* evidence in an action brought against and involving the liability of sureties upon an official bond. It was so declared in Massachusetts

in 1845, the learned Chief Justice Shaw preparing the opinion (*City of Lowell v. Parker*, 10 Met. 309; 43 Am. Dec. 436), although in later cases the court departed from this doctrine, as will be seen upon an examination of the authorities hereinafter cited. That these judgments are at least presumptive evidence as against sureties upon an official bond has been held in *Stephens v. Shafer*, 48 Wis. 54; 33 Am. Rep. 793; *Norris v. Mersereau*, 74 Mich. 687; *Graves v. Bulkley*, 25 Kan. 249; 37 Am. Rep. 249; *Fay v. Edmiston*, 25 Kan. 439; *Charles v. Haskins*, 14 Iowa, 472; 83 Am. Dec. 378; *Mullen v. Scott*, 9 La. Ann. 174; *Miller v. Rhoades*, 20 Ohio St. 494; *Taylor v. Johnson*, 17 Ga. 521; *Carr v. Meade*, 77 Va. 142; *De Greiff v. Wilson*, 30 N. J. Eq. 435. We gather from *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619, 35 N. Y. 121, that this rule also prevails in New York.

A variety of reasons have been given in support of this rule, and many of them were referred to and commented upon in *Stephens v. Shafer*, 48 Wis. 54; 33 Am. Rep. 793. We need not state them.

There is also a very respectable array of authorities which fully sustain the doctrine that, where a judgment is recovered against an officer for official misconduct, and against which sureties upon his bond have covenanted, it is absolutely conclusive on the sureties, in the absence of fraud or collusion, both as to the official misconduct and the extent of the damages. Among these cases may be ³²² noted *Masser v. Strickland*, 17 Serg. & R. 354; 17 Am. Dec. 668; *McMicken v. Commonwealth*, 58 Pa. St. 213; *Chamberlain v. Godfrey*, 36 Vt. 380; 84 Am. Dec. 690; *Tracy v. Goodwin*, 5 Allen, 409; *Dennie v. Smith*, 129 Mass. 143—both these Massachusetts cases are subsequent to *City of Lowell v. Parker*, 10 Met. 309; 43 Am. Dec. 436.

While the authorities are wide apart upon the question it is evident that the decided weight is in favor of the doctrine that a judgment against the principal upon an official bond is *prima facie* evidence against the sureties. By this rule the right is reserved to such sureties to interpose any defense they may have, and to be fully heard on the merits.

After a full examination of the authorities, in deference to the great weight in this direction, and believing that convenience and public policy require and will be promoted by its approval, we accept and adopt the *prima facie* doctrine. We admit that the rule first mentioned herein, declaring

judgments against principals upon official bonds ineffectual as against sureties, is more easily sustained on principle. In fact the *prima facie* doctrine has less to justify it than that which makes a judgment against the principal conclusive upon his sureties, except where there has been fraud and collusion. There is some difficulty in standing upon the middle ground of presumption.

The counsel for appellants have cited and relied upon the very recent case of *Pioneer Sav. & Loan Co. v. Bartsch*, 51 Minn. 474; 38 Am. St. Rep. 511. We regard the views therein set forth as sound on principle, and rest satisfied with the conclusion therein reached; but, for the reasons before mentioned, we adopt the *prima facie* rule as the most practical and desirable one when official bonds are involved.

Order affirmed.

JUDGMENT AGAINST OFFICER AS EVIDENCE AGAINST THE SURETIES.—The law as to the effect of a judgment against the principal as evidence against the sureties is not settled. Its various phases are discussed in a monographic note to *Charles v. Hoskins*, 83 Am. Dec. 380, 381. See, also, *Pacewalk v. Bollman*, 29 Neb. 519; 26 Am. St. Rep. 399.

LANE v. HOLMES.

[55 MINNESOTA, 379.]

EQUITY—MISTAKE.—FOR A MISTAKE OF LAW, pure and simple, there is generally no remedy, but relief may be afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and is attempting to enforce an unconscionable advantage without consideration, provided the other party is not blamable.

MISTAKE.—EQUITABLE RELIEF CAN BE GRANTED if there is a mistake of fact, or a mistake of law and fact combined, especially if it does not result in injury to the opposite party.

MISTAKE IN FORECLOSING MORTGAGE—RESALE.—If, by mistake in the computation of interest, mortgaged premises are sold at foreclosure sale for more than is due, and the property is worth less than is due, the mortgagee, having bid in the premises with the object of extinguishing the indebtedness, may be relieved in equity, and a resale ordered, without a tender on his part of the value of the use of the premises after the expiration of the time for redemption, that value being much less than the mistake made in the interest.

APPEAL by the plaintiff, Mary C. Lane, from an order denying her motion for a new trial.

W. B. Douglass, for the appellant.

John E. Greene, for the respondent.

²⁸¹ BUCK, J. The plaintiff and her husband executed to the defendant a promissory note as follows:

"\$3,000.

MOORHEAD, July 10, 1885.

"Five years after date, I promise to pay to the order of John W. Holmes three thousand dollars, at Fulton Bank, New York, value received, with interest before and after maturity at the rate of—— per cent per annum until paid.

"ALPHEUS F. LANE.

"MARY COLE LANE."

At the same time they executed a mortgage on the northeast quarter of section thirty-two (32), township 139, range 48, in Clay county, to secure the payment of said note, which mortgage contains this clause: "*Provided, nevertheless, that if said Mary Cole Lane and Alpheus F. Lane, parties of the first part, their heirs, shall well and truly pay or cause to be paid to the party of the second part, his heirs, the sum of three thousand dollars and interest, according to the conditions of one promissory note in the amount of \$3,000, made, executed, and delivered by said Mary Cole Lane and Alpheus F. Lane to said John W. Holmes, due five years after date, which said note is without interest, bearing even date herewith.*"

There being default in the payment of the note, or any part thereof, the defendant, residing in the state of New York, sent the note and mortgage to an attorney of Moorhead, Minnesota, with instructions to foreclose the mortgage, but without instructions as to the amount due. The attorney foreclosed the mortgage, and in the notice of such foreclosure proceedings it was claimed that there was due upon said note and mortgage the sum of \$4,102, which amount was arrived at by computing interest upon the note at the rate of seven per cent per annum from the date thereof to the date of the notice of foreclosure sale; and the said premises were bid off, December 15, 1890, for that sum, with expense of foreclosure added, amounting to \$4,222.34. The premises were bid in by the ²⁸² defendant's attorney for and in the name of defendant in good faith, and without any design on the part of the defendant or his said attorney to defraud or injure plaintiff, or prejudice her interests or rights in the premises, as the said premises at the time of such fore-

closure sale were not of greater value than \$2,500, and never were, at any time between the time of such sale and the time of the commencement of this action, of greater value than \$3,000. The defendant did not know until after such foreclosure sale that such interest had been included in the amount for which said premises were so bid in for him by his attorney, as it was the purpose and intent of the defendant by such foreclosure to extinguish the indebtedness of the plaintiff and her husband to him under said note and mortgage; and that the only instructions he gave to his said attorney in the foreclosure proceedings were that the premises should be bid in for the defendant for the full amount due, regardless of the value of the mortgaged premises, it not being the intention of the defendant at the time of the execution of the mortgage to charge interest upon the indebtedness thereby secured, nor the understanding of the plaintiff that interest should be charged thereupon. There was no redemption from such foreclosure sale, and the plaintiff did not have actual notice of the sale or the amount bid until six months subsequent to the time of such sale, although her brother was her tenant, and cultivating the premises during the foreclosure proceedings, and boarded near said farm, and upon whom due notice of foreclosure proceedings were served as the party actually in possession, as required by law. The plaintiff never objected to the sale on account of the amount claimed in the notice of sale being in excess of the amount legally due upon the mortgage debt, and she has never tendered to plaintiff any amount upon said mortgage debt, and the defendant did not at the time of sale, nor at any other time, ever receive from the sheriff or other person any money as the proceeds of said sale.

This action was commenced in the month of November, 1892, to recover the sum of \$1,032.80, being interest so added to the principal of said note, and claimed to be the surplus over and above the amount actually due on said note and mortgage at the time of such foreclosure sale. On the trial in the court below the defendant in open court tendered to the plaintiff a deed of conveyance to the ~~222~~ plaintiff of the premises described in said mortgage upon the payment to this defendant of the sum of \$3,000, without interest or costs of said foreclosure suit, which tender was refused by the said plaintiff. Briefly, the case is this: Plaintiff or her husband, on July 10, 1885, or before that time, received of defendant

\$3,000, which sum was to be without interest, as they claim, and payable in five years, secured by a mortgage on her land, worth at the time of the foreclosure sale, December 5, 1890, not exceeding the sum of \$2,500, and at no time since of greater value than \$3,000; and they now assert their legal right to pay and satisfy the note and mortgage with accrued interest from the maturity of the note, July 10, 1890, with the mortgaged property of less value than the amount legally due on the mortgage, and then, in addition to this, to recover a judgment against the defendant of \$1,032.80, an alleged surplus on the foreclosure sale, and which accrued, if at all, by an error or mistake on the part of defendant's attorney in the computation of the interest on the note and mortgage. If this action is sustained the plaintiff will recover a judgment for \$1,032.80, for which she never paid any consideration whatever. We have no hesitation in saying that such a claim is unconscionable, and it would be a reproach to our jurisprudence if the defendant cannot be afforded relief.

In view of the admission of the parties as to the agreement not to pay interest on the \$3,000 we are not necessarily called upon to decide whether the note drew legal interest; but when we examine the mortgage, and find therein a clause wherein it is stated that it is given to secure this note of \$3,000 and interest, and then also stating that the mortgage is given to secure the same note without interest, we are not surprised that the attorney construed the note as drawing interest. In the case of *Hoopes v. Collingwood*, 10 Col. 107, 3 Am. St. Rep. 565, the court assumes that a note similar in form to the one in this case drew legal interest. Such uncertainty, as to whether the note and mortgage drew interest, would fully justify the findings of the court below that the interest so added was done in the utmost good faith by the attorney, and we do not decide but what he was legally right in such computation, so far as relates only to the interest on the note. But, in addition to this complex question of the payment of interest involved by the terms of the ²⁸⁴ note and mortgage, it now appears that at the time of the execution of the note and mortgage the parties understood that neither the note nor mortgage should draw interest at any rate. Of this latter fact the defendant's attorney does not appear to have been notified, or aware of that fact at the time he so computed the interest on the note or at the time of the foreclosure sale. If he had known of this im-

portant and conceded fact it would have thrown such light upon the question as would undoubtedly have induced him to have foreclosed the mortgage without any claim for the five years' interest, and thus have prevented this unfortunate litigation. Assuming this to be so, we then think that such attorney was misled by his ignorance of an existing material fact, known, it is true, to both parties, but unknown to defendant's attorney, who resided many hundreds of miles distant from his client.

Now, construing the note and mortgage together, and conceding that they did not by their terms draw interest until due, and that the attorney, in computing the interest on the note from its date to maturity, made a mistake in the law applicable thereto, is the defendant without remedy or relief? If we are correct in our view of the fact that the attorney was misled by his ignorance of the existence of a material fact by the agreement of the parties that the note should not draw any interest, then we have to deal with two mistakes—one of law and one of fact; and, where both combine to constitute any injury to a party, he is entitled to equitable relief, especially where such circumstances surround the case as are presented by this record. We are not unmindful of the general rule that for a mistake of law, pure and simple, there is generally no remedy or relief, but there may be relief afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and attempting to enforce an unconscionable advantage without consideration, and the other party not being blamable: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. In the case just cited numerous authorities are quoted to show that in mistakes of law in certain cases relief may be afforded, and the case itself is an instructive one upon this question. It is also there held that such relief may be afforded for the mistake of only one of the parties, and that the mistake need not be mutual. But in cases where there ³⁸⁵ is a mixed question of mistake of law and fact, or of fact alone, relief can be granted, especially if the opposite party will not thereby be injured.

The plaintiff claims that the defendant did not offer to pay plaintiff the value of the use of the premises by defendant after the expiration of the time for redemption, amounting to \$200; and that, if the defendant seeks equitable relief, he

should, at the time of the tender of the deed to plaintiff, have tendered or offered to pay her this amount. But was this essential? This is not a case between a trespasser or wrongdoer, or even a tenant upon the land of plaintiff. The defendant was a mortgagee in possession after forfeiture of the conditions of the mortgage by the implied, if not actual, consent of the mortgagor. Plaintiff claims that the mortgage was legally foreclosed, and it appears that at such time she was not in the actual possession. By bringing this action in the manner and for the purpose she did she substantially asserts the right of the defendant to the possession thereof, and admits thereby that he obtained lawful possession of the premises after the conditions broken, and after the time for redemption expired. Now, if, as a mortgagee, he lawfully obtained possession of the premises after forfeiture, the mortgagor could not recover possession without satisfying the mortgage: *Pace v. Chadderdon*, 4 Minn. 499.

This would be so whether there was a valid foreclosure or not. At the time of the foreclosure sale the principal sum of \$3,000 and accrued interest from July 10, 1890, to time of sale was actually unpaid; and at the time of the trial of this action, June 20, 1893, there was more than \$600 of accrued interest, calculating the same from July 10, 1890, upon the principal of \$3,000, if there had been no foreclosure at all. This amount of interest due and payable after the conditions in the mortgage were broken amounted to three times the amount of the value of the use of the land by defendant as found by the court. If, therefore, the defendant was lawfully in possession of the premises there is no equity in the plaintiff insisting that, as a basis of relief to be afforded the defendant, he should have tendered to the plaintiff the value of the use of the premises, viz: \$200, while the defendant was in the possession thereof.

If there shall be a vacation and annulling of the said mortgage sale, and a resale of the premises under a mortgage foreclosure sale ³⁸⁶ in accordance with the order to be made herein, then the question of rent or value of the use of the premises can be adjusted by the parties or the court, and the true amount found due on said mortgage if the proper and legal application is made for such purpose.

The defendant was entitled to the affirmative relief asked for in his answer, but the foreclosure could not be allowed to stand, and at the same time the plaintiff's action dismissed.

The court, in addition to dismissing the plaintiff's action, should, upon the facts found, also have ordered that the sale be set aside and a resale made. No new trial is necessary, but the case is remanded, with directions to the court below to amend its conclusions of law and order for judgment in accordance with this opinion.

MISTAKE OF LAW.—The general rule is that equity will not relieve against a bare mistake of law: *Berry v. American Central Ins. Co.*, 132 N. Y. 49; 28 Am. St. Rep. 548, and note; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. But there are four principal exceptions to this rule stated in the note to *Renard v. Clink*, 30 Am. St. Rep. 461. It will grant relief if the plaintiff is blameless, and the defendant is not in a position entitling him to equitable protection, where it appears that the latter, availing himself of the mistake, seeks, without consideration, to take an unconscionable advantage: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. Equity will relieve against mutual mistake: *Riegel v. American Life Ins. Co.*, 140 Pa. St. 193; 23 Am. St. Rep. 225, and note.

IF THE MISTAKE IS ONE BOTH OF LAW AND FACT, though the latter is the result of the former, relief will be granted when justice and equity require it: *Freeman v. Curtis*, 51 Me. 140; 81 Am. Dec. 564.

IN RE ELLIS' ESTATE.

[55 MINNESOTA, 401.]

STATUTES—PASSAGE OF LAWS—EVIDENCE.—Every bill signed and approved as required by the constitution is presumed to have been properly passed. The absence from the journal of either house of an entry showing that a particular thing was done is no evidence that it was not done, unless the constitution requires the entry to be made. It does not require an entry showing that a bill was read on three different days, or that it was passed under a suspension of the rule. Hence, the act of 1889, known as the "Probate Code," must be presumed to have been properly passed.

LOST OR DESTROYED WILL—DEFEATING ADMINISTRATION—EVIDENCE.—Unless a lost or destroyed instrument can be established as a will it will not defeat administration. Mere proof of a will, without evidence of its contents, is insufficient; and evidence that the testator had not capacity to revoke it is immaterial.

JUDGMENT OF ANOTHER STATE—HOW PROVED.—The judgment of a court of another state, if authenticated as provided by the act of Congress, must be received in evidence; but it is admissible here if authenticated according to the statute of this state, though such authentication may not be as full as that required by the act of Congress.

JUDGMENT-ROLL OF ANOTHER STATE COURT—EVIDENCE.—The judgment-roll of another state court, or an authenticated copy of it, is evidence of all that it properly contains, including the judgment; and is, at least, *prima facie* evidence that the judgment was properly rendered and entered so as to have effect.

DIVORCE—PLACE OF TRIAL IN ACTION FOR—JURISDICTION.—The trial of an action for divorce in a county other than that declared by statute to be the proper county for its trial does not go to the question of jurisdiction; and, in the absence of proof to the contrary, the law of a sister state in which the divorce was granted will be presumed to be the same as our own on this point.

DIVORCE IN ANOTHER STATE—COLLATERAL ATTACK.—If the judgment of a court of a sister state, granting a divorce on the complaint of a wife, is collaterally attacked in this state, its validity cannot be affected by the fact that she was induced to bring the action by persuasion, ill-treatment, and threats by the husband that unless she did bring it he would continue his ill-treatment.

DIVORCE IN ANOTHER STATE—VOLUNTARY APPEARANCE—COLLATERAL ATTACK—JURISDICTION—JUDGMENT.—If both parties voluntarily appear in an action for divorce in the court of another state, and submit to its jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that, when the action was brought and judgment rendered, neither of them was a resident of that state, but that both were residents of this state.

DIVORCE IN ANOTHER STATE—COLLUSION—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.—If residents of this state go to another state for a divorce, collusion between them as to the judgment to be rendered in the action does not affect the jurisdiction of the court of that state, or render its judgment void when collaterally attacked in this state.

FLORA ELLIS sought, in the probate court, to be appointed administratrix of the estate of Matthew Ellis, deceased, claiming that he died intestate on December 7, 1892, and without issue or surviving parent, and possessed of real and personal property valued at sixty thousand dollars. Jane Walker, a sister, and Charles Ellis, a brother, contested the application for appointment, on the ground that the deceased had executed a will giving to them a large part of his property, and which he had not revoked while possessing testamentary capacity. Rachel Ellis also contested on the ground that she was his widow, and that a divorce obtained by her in the state of Wisconsin at his request on March 27, 1884, was void for want of jurisdiction over the parties, they being residents of St. Paul, and that his subsequent marriage to the petitioner, Flora Ellis, on September 2, 1886, was void. On January 26, 1893, Flora Ellis was appointed sole administratrix. The contestants severally appealed to the district court, where it was shown that deceased had made a will in July, 1891, which he destroyed on December 31, 1891. The contents of the will were not satisfactorily proved. Deceased being in ill health, his brother and sister claimed that he had not testamentary capacity at the time he destroyed the will. The court refused to receive evidence of his incapacity

to revoke the will because its provisions were not clearly and distinctly proved by two credible witnesses. The court found that the divorce was valid, that Flora Ellis was the lawful wife of the deceased, that he died intestate, and that she was entitled to letters. The judgment of the probate court was affirmed. The contestants appealed from an order overruling their motion for a new trial.

F. G. Ingersoll and Charles N. Bell, for the appellants.

M. L. Countryman and Stringer & Seymour, for the respondent.

405 GILFILLAN, C. J. Appeal from an order appointing an administratrix. Stating the history of the matters involved in chronological order, in 1869 Matthew Ellis and Rachel Cottrell, then residents in Wisconsin, intermarried in that state, and resided therein—the latter part of the time at Hudson—from the time of their marriage till October, 1883, when they came to St. Paul, Minnesota, February 29, 1884, she commenced, by proper personal service of summons, an action against him for divorce in the circuit court for the county of St. Croix (in which Hudson is situated), in said state. Her complaint was sworn to by her, and it alleged, among other things, that she then was, and for more than three years last past had been, a resident of said county and state, and that for more than a year prior to bringing the action the defendant had willfully deserted and refused to live and cohabit with her, and it demanded judgment dissolving the marriage, and requiring the defendant to pay her the sum of eight thousand dollars alimony. The defendant filed an answer, not raising any substantial issues, and the parties made and filed a stipulation agreeing upon the alimony at six thousand one hundred and fifty dollars, and a horse, carriage, robes, etc., and all the defendant's household goods except his library. The answer and stipulation suggest an agreement between the parties for a divorce—a suggestion **406** which ought to have caused the court, and we must assume that it did, to require strict and ample proofs of the facts showing a cause of action, and which would have been influential upon an application to vacate the judgment rendered on the ground of collusion and fraud upon the court. But that did not go to the jurisdiction of the court over the case. A reason for deciding against the plaintiff, or a fraud

upon the court as to the judgment to be rendered, or the character of the motive that induced the bringing the action, does not affect the jurisdiction. March 27, 1884, judgment in that action was rendered, dissolving the marriage between the parties, and allowing the plaintiff therein the alimony stipulated; and that alimony was paid. September 2, 1886, Matthew Ellis and Flora Wilson intermarried, and they lived together as husband and wife until December 7, 1892, when he died in St. Paul, Ramsey county, in this state.

Flora Ellis, the second wife, filed a petition in the probate court of said county, stating the necessary jurisdictional facts, alleging that Matthew Ellis died intestate, and that she was his widow, and asking to be appointed his administratrix. On the day appointed for the hearing Rachel Ellis appeared, denied that Flora was the widow, alleged that she was the widow, and asked that she be appointed administratrix. At the same time appeared a brother and sister of deceased, representing that the deceased had made a will, still in force, and asking the court to make the proper order or decree in the premises. The probate court appointed Flora administratrix, and on an appeal to the district court, in which the court heard all the parties, that court affirmed the decision of the probate court.

Before taking up the principal question in the case, the only one which seems to us of sufficient importance, as presented by the evidence, to call for consideration at any length, we will dispose of others of less importance. It is claimed by appellants that the act of 1889, known as the "Probate Code," was not passed in the house of representatives in the manner prescribed by the constitution, because it does not appear from the house journal that the bill was read on three different days, or that the rule was suspended, as required by the constitution. It is not clear to us what ~~the~~ the Probate Code has to do with the case, for the rule providing who shall be entitled to administration was the same under the prior law as under that act, and the evidence of a will offered was not sufficient to establish a will not produced either under the prior law or the Probate Code. Every bill signed and approved as required by the constitution is presumed to have been properly passed. And, as held in *State v. Peterson*, 38 Minn. 143, the absence from the journal of either house of an entry showing that a particular thing was done, is no evidence that it was not done, unless the consti-

tution requires the entry to be made; and there is no such requirement in respect to the reading of a bill on three different days, or its passage under a suspension of the rule. The objection, therefore, is not well taken.

Ellis executed two wills—one in 1890, which he destroyed, with intent to revoke, in July, 1891, when he executed another. He destroyed that will, apparently with intent to revoke it, December 31, 1891. The appellants offered evidence tending to prove that at that date he had not sufficient mental capacity to make or revoke a will. On the respondent's objection this evidence was excluded, on the ground, as we understand, that it was immaterial, because there was not sufficient evidence of the will.

It must be apparent that, in order to defeat an application for the appointment of an administrator, proof of a will, not forthcoming, must be such as to show that it can be established. Proof that one was executed will not suffice without proof to a reasonable certainty of its contents. To establish a will without such proof would be to make a will for the party.

The evidence afforded no means of determining with any degree of certainty what disposition the will of July, 1891, made of the testator's property. The most that could be made of it was that it left to Flora Ellis one-third of the property, and something more, but how much or what more did not appear; that there were specific devisees or legacies to others, but to whom, except one, or how much to any one of them, did not appear; and that there was a residuary devisee or legatee, but who, did not appear; and there were no means of determining how much would be the residue.

Of course a will not produced could not be established on any ⁴⁰⁸ such evidence, and evidence that the testator had not capacity to revoke it would be immaterial.

That leaves only the question, Which of the two, Flora or Rachel, was the widow of Matthew Ellis? That depends on the validity of the judgment divorcing Rachel and Matthew.

It is objected that the judgment was not sufficiently proved, because: 1. The authentication was not in conformity with the act of Congress; 2. The copy authenticated is a copy of the judgment-roll, and it does not appear the judgment was ever entered in the judgment-book.

When the proceedings of a court of another state are authenticated as provided by act of Congress they must be received as evidence; but it is competent for the legislature

of each state to provide that proof of such proceedings may be received in the courts of such state by authentication less than is prescribed by act of Congress, and the authentication in this case was in accordance with the statute of the state.

We will assume that the laws of Wisconsin are the same as our own in respect to entering judgments and making up the judgment-rolls. The roll, or an authenticated copy of it, is evidence of all that is properly contained in it, including the judgment, and is evidence, *prima facie* at any rate, that the judgment was properly rendered and entered so as to have effect.

It is objected to the judgment that by the laws of Wisconsin (which on this point were proved) the action for divorce is a local action—that is, that it is properly triable in the county where the parties, or one of them, resides; that by the pleadings it appears that the only county in which either party resided was the county of St. Croix, but that the hearing in the action was had in the county of Eau Claire. And it is urged that in hearing the case the court acted without jurisdiction. We are not referred to any decision in that state as to the effect on the jurisdiction of a trial (by the same court) in one county when the statute provides that the trial ought to be in another. In this state it might be an irregularity, and, if objected to, error, but would not affect the jurisdiction of the court so as to render the judgment void: *Gill v. Bradley*, 21 Minn. 15; *Kipp v. Cook*, 46 Minn. 535; 400 *Tullis v. Brawley*, 3 Minn. 277. And we assume that the rule is the same in Wisconsin.

The appellants offered, in order to impeach and avoid the judgment, to prove that Rachel Ellis was compelled to bring the action by the defendant's course of conduct toward her, which consisted in endeavoring to persuade her to bring the action; that during the period of two years he abandoned her at different times, at first for a week at a time, gradually lengthening the periods of absence until they became three months at a time, leaving her unprovided with the necessities of life, and threatening, whenever he returned, that he would continue that course of conduct unless she consented to bring the action, and that unless she so consented he would run away, and leave her without a penny; and also to prove other acts of his of a similar character, all of which had such effect upon her nerves and health and mental condition that

she was not a free agent, in which condition she brought the action; from all which it is claimed she brought it under duress. Whether at any time, and especially whether after she has received and enjoyed the fruits of the action, and has acquiesced for years, until the defendant has married again, and has died, and there is left solely the matter of distributing his property, a woman plaintiff could, because of such facts, obtain any relief in the same action, we will not undertake to say. Certainly it would be no ground for assailing the judgment in a collateral proceeding at any time. In the majority of actions for divorce by wives on the ground of desertion or ill usage the same claim of duress to bring the action might be made as in this case, and the stronger the grounds for divorce the stronger would be the ground to avoid the judgment whenever it might be convenient or profitable to do so. The court properly excluded the evidence.

The principal question in the case was presented by the appellants' offer to prove, and the ruling of the court excluding the evidence, that at the time of bringing the action in Wisconsin, and of the divorce decree, neither of the parties to it was a resident of that state, but that both were residents of this state. It is claimed for the evidence that, if admitted, it would have shown that the Wisconsin court had no jurisdiction of the subject matter ⁴¹⁰ of the action, to wit, the marital relation between the parties; that consequently the decree was void, Rachel remained the wife, and is now the widow, of Matthew, and that the marriage with Flora was void.

The question thus raised is of great importance, and difficult to satisfactorily determine. It is an undisputable general proposition that the tribunals of a country have no jurisdiction over a cause of divorce, wherever the offense may have occurred, if neither of the parties has an actual, *bona fide* domicile within its territory. This necessarily results from the right of every nation or state to determine the *status* of its own domiciled citizens or subjects without interference of foreign tribunals in a matter with which they have no concern. But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties.

When, as between whom, and to what extent is such de-

termination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes: 1. In proceedings between the state of the parties' actual residence and one of the parties; 2. In proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; 3. In proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended.

In the second class of cases it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment.

Of the decisions in cases coming under the first class we refer to four: *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 21; *Van Fossen v. State*, 37 Ohio 411 St. 317; 41 Am. Rep. 507; *People v. Dawell*, 25 Mich. 247; 12 Am. Rep. 260; and *State v. Armington*, 25 Minn. 29—all cases between the state of actual residence and one of the parties. In the first of these the record of the judgment showed that neither of the parties was a resident of Utah, where it was rendered, so that the record impeached itself. It was, of course, held that the judgment was void. In each of the others it was held that, in order to show want of jurisdiction in the court rendering the judgment, it might be shown that neither of the parties resided within the state in which it was rendered, and, that being shown, it was void. In the opinion in each case language is used apparently sustaining the proposition that such would be the rule, however the question of the validity of the judgment might arise. In *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260, Mr. Justice Cooley delivered the prevailing opinion, Mr. Chief Justice Christianity concurring, and Mr. Justice Campbell, dissenting. It was enough for the purpose of that case to decide whether the judgment was valid as against the state of residence. Whether it was valid as between the parties was not before the court; and such was the case in *Hood v. State*, 56 Ind. 263; 26 Am. Rep. 21, and *State v. Armington*, 25 Minn. 29. So far as the state of residence is concerned it must be taken upon the authorities, and certainly in this state, upon

the *Armington* case, that it is not bound by a judgment divorcing two of its resident citizens, rendered by a court of another state. There are reasons why it should not be bound, however it may be between the parties which we will presently refer to.

It does not follow that the judgment is void in the third class of cases. A judgment operating on a *res* may be binding between the parties to the action without binding one not a party, but interested in the *res*. In an action for divorce the *res* upon which the judgment operates is the *status* of the parties. There are three parties interested in that—the husband, the wife, and the state of their residence. This was in the mind of Mr. Justice Cooley in writing the opinion in *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260. He said: “But it is said if the parties appear in the case the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively.” “As the laws now are there are three parties to every divorce proceeding—the husband, ⁴¹² the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion.” “Such being the case, suppose we admit that the parties may be bound by their voluntary appearance in the foreign jurisdiction. How does that affect the present case? How and in what manner did the Indiana court obtain jurisdiction of the third party entitled to be heard in this proceeding; that is to say, of the state of Michigan”? This line of reasoning was applied by the same court in *Waldo v. Waldo*, 52 Mich. 94. One question in that case was whether the plaintiff was the widow of Jerome B. Waldo, just as in this it is whether Flora Ellis is the widow of Matthew. Previous to her marriage to Jerome B. she had been married to one Carey, from whom she had obtained a divorce in Indiana, both parties appearing in the action for it. The court held the judgment could not be assailed by showing want of residence in Indiana and residence in Michigan, saying in one part of the opinion: “This state has never complained of that judgment, and neither party has objected to it.” The case of *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260, was not referred to, and we may, from both cases, take the rule in that state to be

that, while the state cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce, the parties may so bind themselves in respect to their individual interests. In *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132, a private action, it was held that a judgment of divorce by the court of another state, both parties appearing in the action, could not be assailed on the question of residence. In the course of the opinion the court, Church, C. J., said: "Nor can I assent to the reason given for allowing the husband to repudiate the binding force of the judgment upon him, after voluntarily submitting himself to the jurisdiction of the court, and litigating the case upon its merits"; thus recognizing the effect of the voluntary submission upon the parties' right to question the judgment. Cases in Massachusetts, to which we are cited by appellants, are hardly of authority on the point, because ⁴¹³ the decisions were based mainly on a statute of that state. *Ellis v. White*, 61 Iowa, 644, has only bearing on one phase of this case. It was there held that a plaintiff, in an action for divorce and alimony, cannot question the jurisdiction of the court after accepting the benefits of the judgment.

It may seem anomalous that a judgment of divorce can be so far effectual between the parties as to extinguish all rights of property dependent on the marriage relation, without being effectual to protect them from accountability to the state for their subsequent acts. One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in nowise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: "It is true that by false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render; and, of course, what will bind them will bind those

who claim through them, or either of them, which is the case with the appellants other than Rachel.

There were other minor questions raised by the assignments of error, but we do not see any merit in any of them.

Order affirmed.

STATUTES—PRESUMPTIONS.—Except when the legislative journal affirmatively shows a violation of the constitution courts will supply by presumption every thing necessary to the validity of a law: *Hollingsworth v. Thompson*, 45 La. Ann. 222; 40 Am. St. Rep. 220, and note, showing that it need not affirmatively appear from the journal that every act required to be done in the enactment of a law has been done.

PROBATE OF LOST OR DESTROYED WILLS.—A lost or destroyed will may be established and admitted to probate: *Apperson v. Cottrell*, 3 Port. 51; 29 Am. Dec. 239. But it must appear by the clearest and most satisfactory evidence that the instrument was properly executed, and was not revoked by the testator, and what were its contents: See monographic note to *Tynan v. Paschal*, 84 Am. Dec. 628-631, on the probate of lost or destroyed wills.

JUDGMENT OF ANOTHER STATE COURT AS EVIDENCE—AUTHENTICATION. The judgment of a court of a foreign country, duly proved, is conclusive between the parties after a trial upon the merits, and where no fraud, mistake, or want of jurisdiction is shown or offered to be shown. Such a judgment is properly authenticated: "1. By an exemplification under the great seal; 2. By a copy proved to be a true copy; 3. By the certificate of an officer authorized by law, which certificate must itself be properly authenticated": See *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404, and note quoting from Freeman on Judgments, section 414: *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661. The judgment of a foreign court, complete and regular on its face, is *prima facie* valid: *Gunn v. Peakes*, 36 Minn. 177; 1 Am. St. Rep. 661.

DIVORCE IN ANOTHER STATE—COLLATERAL ATTACK UPON DECREE.—A final decree of divorce settles all property rights of the parties, and bars a subsequent action by either party to determine any question of alimony or property rights which might have been settled by such decree, and a decree on service by publication is as effectual as where personal service is made. Hence, a valid decree of divorce obtained by a husband from his wife in one state, without provision with reference to property or alimony, is a bar to an action brought long afterward by the wife in another state to obtain a judgment of divorce and for alimony, or for alimony alone, in the absence of proof that the law of the former state is different from that of the latter: *Roe v. Roe*, 52 Kan. 724; 39 Am. St. Rep. 367. There is no doubt that a decree of divorce entered by consent is binding upon the parties, unless impeached for fraud or mistake, and, it is equally true, that a mere temporary residence in the state for the sole purpose of obtaining a divorce is not sufficient to confer jurisdiction: See note to *Watkins v. Watkins*, 21 Am. St. Rep. 219; *Hanover v. Turner*, 14 Mass. 227; 7 Am. Dec. 203, and monographic note thereto, discussing divorces in another state; *Reed v. Reed*, 52 Mich. 117; 50 Am. Rep. 247. It is also clear that a decree rendered in another state without jurisdiction may be collaterally attacked: *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60, and note. But where both

parties, as in the principal case, not only submit to the jurisdiction of another state court, but commit a fraud upon it, and collude and agree as to the decree to be rendered, it seems but just to refuse any relief from the decree when it is collaterally attacked in the state where the parties have their domicile.

STATE v. BILLINGS.

[55 MINNESOTA, 467.]

"DUE PROCESS OF LAW" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, prior to judgment, is absolutely essential.

COMMITMENT OF INSANE—"DUE PROCESS OF LAW."—A valid proceeding to commit one as insane requires notice, and an opportunity to be heard before judgment. There must be a trial before a determination as to his sanity, and an opportunity to produce witnesses and evidence. Hence, a statute authorizing such a commitment, but not so framed as to compel a hearing before judgment, and which does not guarantee to the person charged an opportunity to be heard in defense, is invalid, because it conflicts with those provisions of the state and federal constitutions which forbid that any person shall be deprived of his life, liberty, or property without due process of law.

On June 9, 1893, Maria J. Blaisdell was committed to a hospital for the insane. A warrant was issued to the defendant, Billings, as sheriff, authorizing him to convey her to the hospital. She was discharged by a commissioner on *habeas corpus*, from the officer's custody, on the ground of unlawful detention, and the sheriff appealed. Upon the first hearing in the supreme court it was held that the law had not been complied with, that there had been a clear departure from the requirements of the statute in making the commitment, that the judge of the probate court had determined the question of insanity upon the certificate of the examiners and other evidence, and made his finding accordingly, which was not the finding of the "jury" required by the statute, and that the warrant issued upon such finding was, therefore, wholly void and without jurisdiction. The commissioner's decision on the *habeas corpus* proceedings was affirmed.

M. J. Daly and E. E. Corliss, for the appellant.

Haupt & Baxter and S. L. Pierce, for the relator.

473 COLLINS, J. Upon reargument, January 17, 1894. At the former hearing of this case the attention of the court was not called to the fact that the provisions of the Probate Code

(Laws 1889, c. 46, subc. 14) relating to the commitment of insane persons to the state hospitals had been wholly superseded by certain sections of Laws of 1893, chapter 5. Assuming that the provisions of the Probate Code on this subject were still in force, the court fell into the error of holding that the law had not been complied with, that there had been a complete departure from the requirements of the statute, and that the warrant under which Mrs. Blaisdell had been committed was on its face wholly void, and without jurisdiction. The inevitable result was the granting of respondent's petition for a rehearing. A question new to the case, and of the greatest importance, has now been raised by counsel, for relator, namely, the constitutionality of those provisions in Laws of 1893, chapter 5, which prescribe the course of procedure, and authorize the commitment of persons to public and to private hospitals for the insane. It is urged that these provisions violate the fourteenth amendment to the federal constitution, and are in conflict with a similar article in our state constitution, forbidding that any person shall be deprived of his life, liberty, or property without due process of law. We have therefore to examine the provisions of the statute of 1893 in the light of adjudications as to what is and what constitutes "due process of law," in order to discover and determine whether constitutional rights have been encroached upon and invaded by means of this legislative enactment.

The first inquiry is as to what is "due process of law." In *Bardwell v. Collins*, 44 Minn. 97, 20 Am. St. Rep. 547, it was said that no complete or exhaustive definition of the term had ever been attempted ⁴⁷⁴ by the courts, because it was incapable of any such definition. All that could be done was to lay down certain general principles, and apply them to the facts of each case as they arise. Mr. Webster's exposition of the words "law of the land," and "due process of law," viz: "The general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial"—was quoted; and then the court went on to say that, in judicial proceedings, "due process of law" requires notice, hearing, and judgment. These words, said the court, do not mean any thing which the legislature may see fit to declare to be "due process of law," for there are certain fundamental rights which our system of jurisprudence has always recognized, which not even the legislature can disregard, in proceedings by which a person is deprived of

life, liberty, or property, and one of these is "notice before judgment in all judicial proceedings." In commenting upon the difficulty of defining these words it has been said that it is wisdom to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require: *Davidson v. New Orleans*, 96 U. S. 104. But it may be stated generally that due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the constitution and the usages of the common law, would be a protection to him or to his property: *People v. Board of Supervisors*, 70 N. Y. 228. Due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, is absolutely essential. "Due process of law" without these conditions cannot be conceived: *Stuart v. Palmer*, 74 N. Y. 183; 30 Am. Rep. 289.

It follows that any method of procedure which a legislature may, in the uncontrolled exercise of its power, see fit to enact, having for its purpose the deprivation of a person of his life, liberty, or property, is in no sense the process of law designated and imperatively required by the constitution. And while the state should take charge of such unfortunates as are dangerous to themselves and to others, not only for the safety of the public, but for their own amelioration, due regard must be had to the forms of law and to ⁴⁷⁵ personal rights. To the person charged with being insane to a degree requiring the interposition of the authorities and the restraint provided for, there must be given notice of the proceeding, and also an opportunity to be heard in the tribunal which is to pass judgment upon his right to his personal liberty in the future. There must be a trial before judgment can be pronounced, and there can be no proper trial unless there is guaranteed the right to produce witnesses and submit evidence. The question here is not whether the tribunal may proceed in due form of law, and with some regard to the rights of the person before it, but, rather, is the right to have it so proceed absolutely secured? Any statute having for its object the deprivation of the liberty of a person cannot be upheld unless this right is secured, for the object may be

attained in defiance of the constitution, and without due process of law.

Let us now turn to the statute in question. It must be observed at the outset that private, as well as public, hospitals are within its terms, and for this reason, if for no other, the rights of the citizen should be closely guarded. Laws of 1893, chapter 5, section 17, requires that every person committed to custody as insane must be so committed in the manner thereafter prescribed. Section 19 provides that whenever the probate judge, or, in his absence, the court commissioner, shall receive information in writing (the form being given) that there is an insane person in his county needing care and treatment, he shall issue what is called a "commission in lunacy", (the form thereof being prescribed) to two physicians, styled "examiners in lunacy." This section permits the filing of an information not even sworn to by anybody. That it has opened the door to wrong and injustice—to the making of very serious and unwarranted charges against others by wholly irresponsible and evil-minded persons—is evident, although the method of instituting the proceedings does not affect the validity of the act. The commission directs the two physicians designated, who, under section 18, must now possess certain qualifications, to "examine" the alleged lunatic, and certify to the probate judge or court commissioner, within one day after their examination, the result thereof, with their recommendation as to the special action necessary to be taken. The form of this certificate and recommendation is laid down in section 20. This certificate must be duly sworn to or affirmed before the officer issuing ⁴⁷⁶ the commission: Laws of 1893, c. 5, sec. 21. If (sec. 19) the examiners certify that the person examined is sane the case shall be dismissed. If they disagree the officer shall call other examiners, or take further testimony. If they certify the person to be insane, and a proper subject for commitment, for any of the reasons specified in section 17, it is made the duty of the officer to visit the alleged insane person, or to require him to be brought into court; "but he shall cause him to be fully informed of the proceedings being taken against him." If the officer deems it advisable he may call other examiners, or take further testimony, and in all cases, "before issuing a warrant of commitment," the county attorney shall be informed, and it is made his duty to take such steps as are deemed necessary to protect the rights of such

person. If satisfied that the person is insane, and that the reason for his commitment is sufficient, under the provisions of the act, the probate judge or the court commissioner approves the certificate of the examiners, and issues an order or warrant in duplicate, committing him to the custody of the superintendent of one of the state hospitals, or to the superintendent or keeper of any private hospital or institution for the insane, which under the same law has been duly licensed. This order or warrant may be executed by the sheriff or by a private individual, and through it the person named therein is placed in the custody of the superintendent or keeper to whom it may have been directed. There are some other provisions in respect to these commitments, but they have no bearing on the questions now before us, and we now reach a consideration of the controlling provisions of the statute. The commission issues to the examiners, and they are authorized and directed to "examine" the alleged lunatic. Their examination is not made under oath. It may be formal or informal, as they choose, and the person under examination may not have the slightest idea that he is the subject of inquiry or investigation. The examination may be at any place where the subject can be found, or at a place convenient for the examiners. It may be public or private, and, judging from the questions found in the form to be answered by the examiners, it may consist simply in observing the alleged lunatic, and in making inquiries of him or of his acquaintances, or, for that matter, accepting common street gossip. To illustrate: In the certificate signed by the physicians who made ⁴⁷⁷ this examination is the answer to a most important question, viz: "Has the patient shown any disposition to injure others"? The answer is: "Yes. It is reported that she threatens to shoot, carries firearms, and did shoot at one person passing, not knowing whom."

When this examination, of which the subject need not be informed, and in which he takes no part, is completed, the examiners are required to make a verified written report and recommendation, and on this the officer may commit without any other or further act, except that he must see the subject, either in or out of court, informing him fully of the proceedings, and must also notify the county attorney of what is going on. Not until after the examination, report, and recommendation, upon which the officer may commit, if he so

chooses, need there be any notice whatsoever to the person charged with being a proper subject for the insane asylum, nor need the county attorney be advised of the proceeding. If personal rights are of any consequence, and if they need protection at any time, such notice should precede the examination, not follow it. But, aside from this serious defect in the law, it will be seen that there is no provision which assures to the accused a trial at any time, either before or after notice, under the forms of law; no provision which guarantees to him a judicial investigation and a determination as to his sanity. The officer before whom the inquiry is pending is nowhere required to conduct his examination with the least regards to the rights of the person charged with being insane—his right to exercise his faculties without unwarranted restraint, and to follow any lawful avocation for the support of life.

Nor is the officer obliged to hear a particle of testimony, although he is at liberty so to do. The accused or the county attorney might appear before him with an army of volunteer witnesses; but if their testimony was received or heard, or if there was the slightest approach to a trial, it would be through the grace of the officer, not as a matter of right to the person whose personal liberty is jeopardized by the proceeding. We are not speaking of what every honorable and humane officer would do when a case was before him, but of what the statute will permit an officer to do.

Further examination of this enactment need not be made, for enough has been said to establish its invalidity, and to indicate what outrages might be perpetrated under it. The objection to ⁴⁷⁸ such a proceeding as that authorized by this statute does not lie in the fact that the person named may be restrained of his liberty, but in allowing it to be done without first having a judicial investigation to ascertain whether the charges made against him are true; not in committing him to the hospital, but in doing it without first giving him an opportunity to be heard.

We are compelled to the conclusion that the enactment of the sections referred to is unconstitutional, because they allow and sanction a denial of the protection of the law, and the deprivation of personal liberty without due process of law. But we do not intend to intimate that in this case the upright and conscientious judge of probate before whom it was pending acted arbitrarily, or that he adhered to the letter of

the statute, disregarding the rights or requests of Mrs. Blaisdell or her friends, when, after the examination, report, and recommendation, she appeared before him. There is nothing to indicate such a course. As we have shown, the statute is so constructed that the opportunity to be heard in defense is not guaranteed to the person charged. It is not framed so as to compel a hearing before condemnation or a trial, under the general forms of law, before judgment is pronounced. Where it is plain that legislation upon any subject is in conflict with constitutional provisions, the duty of the court is obvious, and must be performed, whether the interests of a large number or of a certain class of people are involved, or the rights of a single citizen.

The provisions of chapter 5 of the Laws of 1893, on this subject, being invalid, those which they were designed to supersede, found in the Probate Code, are in force, and must be observed. As stated in the former decision, they were not; and, as a consequence, the conclusion heretofore reached is adhered to.

DUE PROCESS OF LAW AS APPLIED TO INSANE PERSONS.—It is a fundamental principle of both state and national constitutional law that no man shall be deprived of "life, liberty, or property" without "due process of law"; and, under the express provision of the fourteenth amendment to the constitution of the United States, no state shall "deny to any person within its jurisdiction the equal protection of the laws." The right of personal liberty is thus jealously guarded by constitutional law, and we are unaware of any distinction between the civil rights of a sane person, and those of an insane subject of the government. Nor should there be any. Persons, though insane, are still human beings, and laws which provide for their commitment to hospitals for proper care and treatment mark, it is said, the vast difference between a civilized free people and a savage nation. Such laws are common, but it must be observed in connection with them that all power over the person is liable to abuse. The deprivation of the liberty of a citizen upon the charge of insanity is a matter of very grave importance, because it may easily happen that for fraudulent purposes, perhaps with a view to deprive a person owning property of his control over it, a perfectly sane man may be sent to an asylum by his relatives, upon a certificate of physicians merely, and be illegally confined there for years. The civil rights of insane persons do not seem to have been often adjudicated by the courts, and a close search for authorities reveals the fact that, since the ratification of the fourteenth amendment, in July, 1868, its doctrines as applied to such persons have seldom been defined. Enough is gleaned from the authorities, however, to show that insane persons have rights, that the mere existence of the fact of insanity does not take away or abridge the rights of the citizen, and that a person charged with insanity cannot be deprived of his civil rights without the formalities prescribed by law: *Commonwealth v. Kirkbride*, 2 Brewst. 400, 419; and it

has been held that statutes providing for the examination, commitment, and custody of insane persons are mandatory, and must be strictly pursued: *Meurer's Appeal*, 119 Pa. St. 115; *State v. Baird*, 47 Mo. 301; *Territory v. Sheriff of Gallatin County*, 6 Mont. 297. If "due process of law" means the regular and orderly course of judicial proceedings in the administration of justice it would also seem clear that a determination of insanity is not conclusive, without the person charged with being insane has had notice, an opportunity to be heard, either in person or by counsel, an opportunity to produce witnesses, and to confront those seeking his retirement to an asylum or hospital, and in general to make whatever defense may be justified by the circumstances of the case. This we conceive to be borne out by the authorities. There is a great diversity of definition as to "due process of law": See *Attorney General v. Jochim*, 99 Mich. 358; 41 Am. St. Rep. 606; note to *State v. Goodwill*, 25 Am. St. Rep. 876; note to *Bardwell v. Collins*, 20 Am. St. Rep. 554-559; *Great West Min. Co. v. Woodmas Min. Co.*, 12 Col. 46; 13 Am. St. Rep. 204. "Due process of law" is not necessarily judicial process. Administrative process, regarded as necessary in government, and sanctioned by long usage, is as much due process as any other: *Attorney General*, 99 Mich. 358; 41 Am. St. Rep. 606; note to *Bardwell v. Collins*, 20 Am. St. Rep. 554-559.

In the class of cases under consideration "due process of law" undoubtedly means "in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights": *Burdick v. People*, 149 Ill. 600; 41 Am. St. Rep. 329. It means, at least, some legal procedure, in which the person proceeded against, if he is to be concluded thereby, shall have an opportunity to defend himself: *Doyle, Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759. For example, a state statute which authorizes the placing of insane persons in certain hospitals or asylums within the state by their parents, guardians, relatives, or friends, or, if paupers, by the overseers of the poor, upon certificates of their insanity, made by two practicing physicians of good standing, and which provides that when placed in such hospitals or asylums they may be lawfully received and detained therein, until discharged in one of the modes provided in the statute, where such statute does not provide a procedure by which the person confined can, as of right, defend himself, is void, as being in conflict with the due process clause of the national constitution: *Doyle, Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759.

The arrest of a person upon a charge of insanity for the purpose of committing or confining him in an insane asylum is, strictly speaking, not an arrest in either a civil or criminal proceeding, but in one *sui generis*, and ought not, in this day of regard for personal liberty, to be allowed otherwise than upon information on oath; yet, where such an arrest is made without an information upon oath, and an order is made directing the alleged lunatic to be brought before the court for examination, the mere want of an information upon oath will not, it has been held, render void the subsequent inquisition, commitment, and appointment of a guardian, even under a constitutional provision requiring cause to be shown on oath for the arrest of a person on a criminal charge, as such a provision does not apply to a charge of insanity: *Sprigg v. Stump*, 7 Saw. 280. On the other hand, it is held that the mere fact that a person is insane does not authorize his arrest and confinement without a warrant if he is not dangerous to himself or to others: *Look v. Dean*, 108 Mass. 116; 11 Am. Rep. 323. No one has a right to confine an insane person for an indefinite period until he

shall be restored to reason, except under the sanctions, and upon compliance with the formalities of the law: *Colby v. Jackson*, 12 N. H. 526; and nothing but actual insanity will authorize the seclusion of a person in an insane asylum against his protestations: *Van Deusen v. Newcomer*, 40 Mich. 90, 142. The confinement, however, of a person dangerously insane is always justifiable, not only for his own protection, but for that of the public. This is conceded; and he may, from the necessity of the case, be arrested without a warrant, even by a private person, and be confined for a reasonable time until the proper legal steps in the matter can be taken: *Colby v. Jackson*, 12 N. H. 526. But the first thing to be determined is whether there is insanity in fact. In any case where that is open to possible question, prudence, at least, would dictate a judicial investigation unless the reasons against it are so imperative as not to admit of the necessary delay, or unless the investigation would probably be so far damaging to the subject of it as to more than counterbalance the probable benefits. All reasoning in favor of confinement without legal investigation assumes the person to be insane. The question of sanity is the very one to be adjudicated. The question as to whether, in doubtful cases, an inquisition to determine the insanity of a person is a prerequisite to his confinement in an asylum came up in the case of *Van Deusen v. Newcomer*, 40 Mich 90. The court was equally divided, two of the justices holding that it was necessary, and two of them that it was not. In this case Mrs. Newcomer, the defendant in error, being at the passenger house of the Michigan Central Railroad at Albion, was, on October 1, 1894, forcibly taken and put aboard the cars of that railroad and removed to the Michigan Asylum for the Insane at Kalamazoo, where she was restrained of her liberty until August 4th following. The persons chiefly instrumental in procuring this confinement were her son in law and his mother, with whom she had had difficulty, but her daughter gave assent. A person having no more legal authority than that which might be claimed for any citizen accompanied her on the cars and to the asylum. The reason assigned for removing Mrs. Newcomer to the asylum was her insanity. There had been no judicial finding of the fact, and it was not made to appear that there were any such manifestations of mental delusion as indicated danger to others. The plaintiff in error was at the time in charge of the asylum, and he received and detained Mrs. Newcomer in the full belief that she was insane. It was not shown that the medical and other assistants in the asylum believed her to be insane while she remained there. On being discharged from the asylum Mrs. Newcomer brought suit for false imprisonment, and recovered six thousand dollars damages. Mrs. Newcomer claimed never to have been insane at all, and the contest in the court below was mainly over the question of fact. The defendant's theory was that the restraint of insane persons in asylums is lawful, and being lawful, the placing of them, whether for their own benefit, or for the protection of others, is in itself "due process of law," even in the absence of any judicial investigation into the question of sanity. While this theory was approved by two of the justices it was disapproved by Justices Cooley and Campbell. The former in his opinion pointed out difficulties in proceeding without judicial inquiry, showing that the law should not tolerate the forcible taking and detention of one in an insane asylum upon the mere assertion that he is mentally unsound; that secret investigations into cases of this character should be frowned down; that safety lies in the publicity of the proceedings; and that, while it is no doubt true a public trial of the fact of insanity would be more or less excit-

ing and disturbing to a mind already in a diseased or abnormal condition, it is by no means certain that the consequences would be more serious than those likely to follow from the sudden arrest and removal for confinement in the asylum of a person who believes himself perfectly sane. "An insane person," said the astute justice, "does not necessarily lose his sense of justice, or of his right to the protection of the law; and when he is seized without warning, and without the hearing of those whom he might believe would testify in his behalf, and delivered helpless into the hands of strangers, to be dealt with as they may decide within the limits of a large discretion, it is impossible that he should not feel keenly the seeming injustice and lawlessness of the proceeding." "Nothing but actual insanity," said Campbell, C. J., "will authorize the seclusion of one who makes known his objections, and claims against reception. If no objection is made by a sane person to his own seclusion he cannot complain of it afterward. The authorities are uniform that there must be consent or actual insanity": *Van Deusen v. Newcomer*, 40 Mich. 90, 142; *Anderson v. Burrows*, 4 Car. & P. 210; *Rex v. Turlington*, 2 Burr. 1115; *Hall v. Semple*, 3 Fost. & F. 337; *Fletcher v. Fletcher*, 1 El. & E. 420; *Look v. Dean*, 108 Mass. 116; 11 Am. Rep. 323; *Colby v. Jackson*, 12 N. H. 526.

Insanity has a multitude of forms, and while a dangerous maniac may be restrained temporarily, even by a private citizen without warrant, until he can be safely released or arrested upon legal process, or committed to an asylum under legal authority, this is not the case in the milder forms of insanity, and even a desire to promote the welfare of the unfortunate individual does not justify an arrest, for nothing is more harmless than some of the milder forms of insanity. The right of personal liberty is deemed too sacred to be left to the determination of an irresponsible individual, however conscientious. The law gives insane persons the safeguards of legal proceedings, and the care of responsible guardians: *Keleher v. Putnam*, 60 N. H. 30; 49 Am. Rep. 304. A complaint charging one with being insane need not necessarily be preferred by a physician, but the machinery of the investigating power may be set in motion by the affidavit of a layman: *Matter of Zimmer*, 15 Hun, 214.

Notice.—If it is true, as held in *Territory v. Sheriff of Gallatin County*, 6 Mont. 297, that the law providing for the examination and commitment of persons alleged to be insane is constitutional, though imperfect in its protective requirements, that the law in such summary proceedings is mandatory, and that every step provided must be strictly pursued (*State v. Baird*, 47 Mo. 301; *Meurer's Appeal*, 119 Pa. St. 115), it would seem that, in lunacy proceedings, an inquisition is void unless notice is given or it appears from the proceedings why it was not given, or defendant's presence required: *McCurry v. Hooper*, 12 Ala. 823; 46 Am. Dec. 280; *Dutcher v. Hill*, 29 Mo. 271; 77 Am. Dec. 572; and it has been held that a commission to examine a person alleged to be an imbecile, etc., issued without the requisite notice, and neither preceded nor followed before judgment by the appointment of a guardian *ad litem*, is not aided by the presence of the imbecile and his representative by counsel, even when the counsel gives his consent to the judgment appointing the guardian, it appearing that the commission issued one day was executed the next, and that the judgment appointing the guardian followed immediately. "The object of notice," it is said, "is that there may be due warning to make objection for legal cause to the commission or any of the commissioners as well as to prepare for adducing evidence on the main question": *Morton v. Sims*, 64 Ga. 298.

We have always understood that no judgment of a court is supported by due process of law if rendered without jurisdiction of the subject matter and notice to the party; but some of the courts have not been over strict in applying the doctrine of notice to cases of insanity. The very object of requiring notice to be given to a party charged with insanity, or of requiring him to be produced in open court when possible, would seem to be designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard. Yet it has been held that an inquisition in lunacy will not be set aside for want of notice of the inquisition in the absence of proof that the alleged lunatic did not have notice of the inquisition, and suffer prejudice for that reason: *In re Lindsley*, 46 N. J. Eq. 358. In this case a constable, eleven days prior to the taking of the inquisition, attempted to serve a written notice thereof upon the alleged lunatic at the house of her brother, where she lived. The brother refused to admit the constable, who then served the notice upon the brother. Upon the same day the constable served a similar notice upon the attorney who had represented the alleged lunatic in similar proceedings which had theretofore been had; and the attorney thus served appeared at the taking of the inquisition in behalf of the alleged lunatic, and examined and cross-examined witnesses for her without objecting that she had not been properly notified. In New York it is requisite, before the court may proceed in lunacy proceedings, that personal and written notice be served upon the alleged lunatic, in addition to the notice required by section 2325 of the Code of Civil Procedure, unless upon a clear case, showing it to be improper or unsafe to give such notice, an order has been made by the court dispensing with it: *Matter of Blewitt*, 131 N. Y. 541. In this case it was said that a very clear case should be made before the court should proceed in lunacy proceedings, in the absence of actual personal and written notice to the party, and that, unless such a case is made by the petition or affidavits, and an order made by the court dispensing with personal notice and providing for notice to relatives or others in lieu of personal notice, an adjudication in the absence of such notice should be set aside. "The cases," said the court, "must be very rare in which a notice may not be served on the alleged lunatic, and it seems to us the better practice would be to require service of notice upon the party (if within the jurisdiction) in all cases, in addition to notice to relatives and others as required by section 2325 of the code. Attempts by interested persons to get control of the person and property of another by the aid of lunacy proceedings, or proceedings on the ground of habitual drunkenness are not infrequent, and no precaution should be omitted which may apprise the party of the proposed action, and enable him to appear and defend. The authorities and text-writers assume that the party proceeded against should have notice of the time and place of executing the commission": See *Matter of Blewitt*, 131 N. Y. 541, 547; *In re Demelt*, 27 Hun, 480. These observations were called out from the fact that the statute providing for notice to relatives and others did not touch the question of the right of the alleged lunatic to have notice also: *Matter of Blewitt*, 131 N. Y. 541, 547. In the later case, however, of *Gridley v. College etc.*, 137 N. Y. 327, the court makes a distinction between notices. A proceeding *de idiota inquirendo* was instituted by a parent of the person proceeded against, and a committee was appointed. Some years afterward this proceeding was attacked collaterally in an action to recover moneys paid by mistake. The attack was made when the papers in the proceeding were offered in evidence, on the ground that the papers showed that the

court never acquired jurisdiction of the proceeding, and further, upon the ground that no notice of the proceeding was ever given to the idiot. It did not appear from the record that all proper notices were not given, and no proof was offered upon the trial to show that the court did not, in fact, acquire jurisdiction. The appellate court upheld the jurisdiction on the ground that, "though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed, upon a collateral attack, that the court, if of general jurisdiction, has acted correctly and with due authority, and its judgment is as valid as though every fact necessary to jurisdiction affirmatively appeared," citing Freeman on Judgments, section 124. As to the question of notice, the court said: "It was not necessary that she (the idiot) should have notice of the application for the commission. Without hearing her and without notice to her the court could constitute the tribunal which was to make inquiry into her mental condition. In pursuance of the order (appointing the commissioners), a time and place for the execution of the commission were appointed, and a jury was summoned by the sheriff, and it appears by proof contained in the record of the proceedings that the idiot had notice of the time and place of the execution of the commission. The record does not disclose that she had notice of any of the subsequent proceedings confirming the findings of the jury and appointing the committee. We do not deem it important now to determine whether the proceedings would be absolutely void and a nullity if no notice whatever had been given to the idiot of any of the proceedings instituted upon the petition of her mother, who had charge of her. They would have been invalid undoubtedly in the sense that they would have been set aside as irregular upon the application of any person who had a right to be heard, as we held in *Matter of Blewitt*, 131 N. Y. 546. But if notice was necessary, the notice given of the time and place of the execution of the writ was sufficient to give the court jurisdiction of the matter. The person proceeded against by such a writ should have notice of the motion to confirm the finding of the jury and for the appointment of the committee, and if such notice be not given, upon the motion of any person entitled to be heard, a court having jurisdiction of the matter may set those proceedings aside. But where the person proceeded against has had notice of the vital part of the proceeding, to wit, the execution of the writ, there is no ground for saying that the proceedings are absolutely void."

The supreme court of Iowa, in *Cluvennes v. Priestley*, 80 Iowa, 316, has probably gone further than any other in attaching little importance to notice in such cases, proceeding, doubtless, upon the assumption that notice in many cases of insanity would be but an idle form. That case was an action for damages for calling the plaintiff insane. The defense was that he had been adjudged insane according to the statute, and that the adjudication had never been revoked or the plaintiff discharged from custody. The plaintiff, in reply to the defendant's answer setting up the adjudication of insanity, alleged that he had no notice of the pendency of the proceedings before the commissioners, and was not present in person or represented by an attorney; that the act creating the board of commissioners of insanity was void, because it did not provide for notice of such actions; and that the effect was "to restrain a person of his liberty without due process of law." The court held, however, that the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law" does not require notice to a person, or his appearance, before he can be lawfully adjudged insane, and accordingly restrained; and that the statute was

valid, and not unconstitutional, because it contemplates that a person may be adjudged insane, and restrained accordingly, without notice or appearance. The court assumed that plaintiff's absence was justified by the facts, and said: "It is not a case in which he is adjudged at fault, or in default, and for which there is a forfeiture of liberty or property, but only a method by which the public discharges its duty to a citizen. The misfortunes of citizens sometimes place them where, for their care and preservation, restraints are necessary, and such restraints are even justified at the hands of private persons. They are not in such cases 'deprived of their liberty' within the meaning of the constitution." It seems clear, from the later cases, especially those from New York, that, in lunacy proceedings, a presumption will be indulged that all proper notices were served, in the absence of any thing in the record to show that they were not served: *Gridley v. College etc.*, 137 N. Y. 327; that a failure to give notice of the application for the appointment of a committee to all the next of kin does not deprive the court of jurisdiction; and that it is sufficient, upon the hearing of the alleged lunatic's motion to set aside the order appointing the commission, that all the parties interested have an opportunity to be heard: *In re Demelt*, 27 Hun, 480. In lunacy proceedings, or proceedings for the appointment of a guardian for an alleged incompetent person, the heirs, whether resident or nonresident, have no absolute right to notice: *Mohr v. Manierre*, 101 U. S. 417; *Munger v. Judge of Probate*, 86 Mich. 363; *In re Rogers*, 9 Abb. N. C. 141.

Evidence—Hearing—Setting Aside Inquisition.—In a lunacy proceeding the unsoundness of mind is the essential thing, and must be clearly established as an independent proposition: *In re Shaul*, 40 How. Pr. 204. An inquisition *de lunatica inquirendo* simply makes a *prima facie* case; and where there is no reason to suspect fraud, the test, in cases where mental unsoundness is charged, is, Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? *Hill v. Day*, 34 N. J. Eq. 150. The opinions of witnesses, who are not physicians or experts in matters of insanity, are entitled to little or no weight as evidence in a trial involving the sanity of a person. They should state the facts and incidents in the life and conduct of the party, from which the court alone is authorized to draw inferences and legal deductions touching the true condition of the mind of the person on trial for interdiction; but great weight and legal effect will be given to the opinion and report of physicians and experts appointed to inquire into the condition of the party: *Eloi v. Eloi*, 36 La. Ann. 563. If the party charged testifies, his conduct is to be considered by the jury as the conduct of any other witness is considered: *Fiscus v. Turner*, 125 Ind. 46. And he has the right to appear and testify before the jury: *In re Dickie*, 7 Abb. N. C. 417. In *Commonwealth v. Haskell*, 2 Brewst. 491, we find the following propositions, viz: That insanity is a mental disease, and must indicate a change in the normal condition; that a change is not, of course, conclusive evidence of insanity, for it may be unattended by any symptoms of disturbance, and may be marked by propriety and moderation; that mere eccentricity or peculiarity is not evidence of insanity where it is shown to be the normal characteristic of the defendant; that mere weakness of intellect is not of itself sufficient to establish insanity, for it may coexist with some degree of power; that one who alleges the insanity of himself or of another must prove it; that the presence of insanity is to be detected by comparing the symptoms of the defendant with

the standard of health, taking into consideration the habits and peculiarities of the defendant when sane, and looking to the causes producing the change; that evidence of insanity in the defendant's family is entitled to consideration; that the test in cases of insanity lies in the word "power"—has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and to avoid the wrong?—in other cases, has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate; that the issue in a proceeding of lunacy is, whether the defendant has been so far deprived of his reason and understanding as to be unable to govern himself or to manage his affairs; that, on the trial of a traverse of a finding in lunacy, the commencement and conclusion are with the commonwealth; that the finding of the original jury upon the petition is not evidence before the jury who try the traverse; that the commonwealth, having first shown that the defendant in a lunacy proceeding was insane before the filing of the petition, may prove his mental condition up to the time of the trial; that it, having shown violence of the defendant toward his wife, may ask the witness "What was the conduct of the wife"? and that it having read in evidence as proof of delusion a letter from the defendant charging others with serious crimes, it is competent for the defendant to prove that one of the charges was not a delusion, but a fact. It is not necessary that the presumption in favor of the sanity of the alleged lunatic should be rebutted by evidence not admitting of a doubt before a verdict can be properly rendered for the commonwealth: *Commonwealth v. Haskell*, 2 Brewst. 491, 508. Evidence voluntarily offered in such cases may be received and acted upon the same as that obtained under compulsory process: *Matter of Kings County Insane Asylum*, 7 Abb. N. C. 425. Under the law of New York the inquiry as to sanity must be confined to the incompetency of the person at the time the inquisition is held, and it is error to include in it a statement that the incompetency existed for any definite period prior thereto: *In re Demelt*, 27 Hun, 480.

Upon the hearing of a motion, made by an alleged lunatic, to set aside the order appointing the commission, it is sufficient if all the parties interested have an opportunity to be heard: *In re Demelt*, 27 Hun, 480. An inquisition in lunacy may be traversed, but, in New Jersey, this cannot be claimed by the alleged lunatic as an absolute right. To permit it lies within the discretion of the court. But, when leave is requested, the chancellor may privately examine the alleged lunatic, to ascertain if he deliberately and understandingly desires the privilege asked for: *In re Lindsley*, 46 N. J. Eq. 358. In that state, at a personal examination of an alleged lunatic by the commissioners and jurors, all other persons, including counsel, may be excluded, so that the commissioners and jurors may be at liberty to exercise their own observations: *In re Lindsley*, 46 N. J. Eq. 358.

An inquisition in lunacy will not be set aside for mere irregularity when there is no doubt as to the lunacy of the party concerned: *Matter of Rogers*, 9 Abb. N. C. 141. The previous service of a juror upon a similar inquisition touching the lunacy of the same person is no ground for setting the inquisition aside, there being no actual bias or misconduct imputable to the juror: *In re Lindsley*, 46 N. J. Eq. 358. But a refusal to adjourn an inquisition for a reasonable time to enable the party charged to make necessary preparation for trial, when he has been prevented from making that preparation by the day named in the notice, is good ground for setting aside the inquisition: *In re Jewell*, 26 N. J. Eq. 293.

Jury Trial.—One cannot be secluded *in invita* as an insane person until

after a regular adjudication of the question by due process of law he has been found to be insane; and "due process of law" in establishing the insanity of a person requires the fact of insanity to be found by a jury of inquiry: *In re Bryant*, 3 Mackey, 489; *Commonwealth v. Kirkbride*, 2 Brewst. 419; *Territory v. Sheriff of Gallatin County*, 6 Mont. 297; *State v. Baird*, 47 Mo. 302; *In re Lindsley*, 46 N. J. Eq. 358; *Fiscus v. Turner*, 125 Ind. 46; *In re Dickie*, 7 Abb. N. C. 417; *Gridley v. College etc.*, 137 N. Y. 327; *De Hart v. Condit*, 51 N. J. Eq. 611; 40 Am. St. Rep. 545. It is true that most of the cases cited seem to have been based on provisions of the statute allowing a trial of the issue of insanity before a jury when, upon an inquisition, the alleged lunatic demands a jury, except in cases where the lunatic clearly appears mentally incompetent to frame such a demand; but it appears that he had the right, at common law, to a trial of such issue by a jury. For a statement of the common-law doctrine, see *De Hart v. Condit*, 51 N. J. Eq. 611; 40 Am. St. Rep. 545. And in *Commonwealth v. Kirkbride*, 2 Brewst. 419, a case not founded upon a statute, the doctrine is clearly announced that no man can be deprived of his liberty without the judgment of his peers, whether the detention is for insanity or crime.

Statutes requiring a party charged with insanity to be produced in open court, when possible, are designed to prevent fraud in the procuring of verdicts of insanity without affording the defendant an opportunity of being heard: *Fiscus v. Turner*, 125 Ind. 46. Counsel may sum up his case before the jury: *In re Dickie*, 7 Abb. N. C. 417. The jury are not authorized to make up their verdict upon the appearance and conduct of the alleged lunatic when he is brought before them; but they must consider all the evidence in the case: *Fiscus v. Turner*, 125 Ind. 46. The legal effect of a verdict as to sanity on an inquisition of lunacy is not impaired by a recommendation of the jury that the alleged lunatic, from long confinement and its consequences, may require some temporary guardianship, as this is proper: *In re Dickie*, 7 Abb. N. C. 417. In *Territory v. Sheriff of Gallatin County*, 6 Mont. 297, one adjudged insane was discharged because the jury who examined him failed to certify upon oath that the charge was correct, and because only two of the three jurors qualified to do so signed the verdict. But, if there is a right to trial by twelve jurymen, a finding of lunacy concurred in by twelve jurymen is not defeated by the fact that only eleven of them visited the alleged lunatic for personal examination: *De Hart v. Condit*, 51 N. J. Eq. 611; 40 Am. St. Rep. 545. So, under a statute requiring that a commission of lunacy shall be directed to eighteen jurymen, any twelve of whom shall execute it, the fact that thirteen acted does not vitiate it: *Field v. Lucas*, 21 Ga. 447; 68 Am. Dec. 465. And the unanimous verdict of a jury of twelve men upon a lunacy inquest, although only twelve jurors be summoned, agreeably to the statute, instead of twenty-four, is sufficient: *In re Lindsley*, 46 N. J. Eq. 358. Again, a statute providing that a commission *de lunatico inquirendo* shall be executed before a jury of twelve men does not contravene the provision of a constitution subsequently adopted, and guaranteeing the right of trial by a jury of twenty-four men, even conceding that such provision applies to proceedings of this nature: *De Hart v. Condit*, 51 N. J. Eq. 611; 40 Am. St. Rep. 545. In Iowa it is held that the restraint of an insane person by virtue of an adjudication of lunacy is not unconstitutional; and that the constitutional provision guaranteeing to the accused, in cases of life or liberty, a speedy trial before an impartial jury, applies only to accusations for offenses against the criminal

law, and not to an inquest of lunacy by a board of commissioners, as provided by statute: *County of Black Hawk v. Springer*, 58 Iowa, 417.

Sufficiency and Conclusiveness of Adjudication.—The appointment of a guardian for an insane person is a determination of the fact of insanity, and will be presumed to have been made under jurisdiction properly acquired in compliance with law: *Ockendon v. Barnes*, 43 Iowa, 615; *Hill v. Day*, 34 N. J. Eq. 150. On an inquisition of lunacy a finding that the alleged lunatic "at the time of taking the inquisition is of unsound mind, and mentally incapable of governing himself or his affairs, and that he has been in the same state since" a specified date, is sufficient without using the word "lunatic," as that is not necessary: *In re Rogers*, 9 Abb. N. C. 141. In an order for the appointment of a guardian for an incompetent person a statement that it satisfactorily appears to the court that such person is mentally incompetent to have the charge and management of his property and person, and that a guardian should be appointed for the reason that he is mentally incompetent to have the charge and management of his estate, is a sufficient adjudication of such facts: *Munger v. Judge of Probate*, 86 Mich. 363. Statutes authorizing the court to appoint a commission to investigate the sanity of a prisoner committed on a criminal charge are not compulsory, but only permissive, and the finding of the commission does not prevent the prisoner from litigating the question of his sanity over again upon the trial under a general plea of not guilty: *Ostrander v. People*, 28 Hun, 38; *People v. McEltraine*, 125 N. Y. 596. If, however, he is tried on such a plea before the same jury that has heard and considered the evidence on his special plea of insanity, and which jury, after disagreement, has been discharged, he is thereby deprived of his constitutional right to trial by an impartial jury: *French v. State*, 85 Wis. 400; 39 Am. St. Rep. 855.

Remedies.—One illegally committed as an insane person may move to set aside the inquisition for insufficiency of the evidence or other material matters: *In re Perrine*, 41 N. J. Eq. 409; or he may be discharged on *habeas corpus*: *Territory v. Sheriff of Gallatin County*, 6 Mont. 297; *Doyle, Petitioner*, 16 R. I. 537; 27 Am. St. Rep. 759. Or an action for damages will lie for a malicious prosecution on a charge of insanity which results in committing to an asylum one who is not insane. The order of commitment in such a case is not conclusive evidence against the plaintiff of his insanity at any time, or of probable cause for the prosecution: *Kellogg v. Cochran*, 87 Cal. 192. In an action, by such a person, for false imprisonment the broadest latitude should be allowed in showing the jury what the patient said and did, and how he appeared when in the asylum, as facts bearing on the question of his sanity: *Van Deusen v. Newcomer*, 40 Mich. 90. The defendant in a lunacy proceeding may personally appeal from a judgment declaring him to be a person of unsound mind: *Cunéo v. Beasoni*, 63 Ind. 524.

Confinement upon Charge of Insanity After Acquittal of Crime on Ground of Insanity.—A statute providing for the confinement in the insane hospital of the state prison of persons acquitted of murder or other felony on the ground of insanity, until discharged by the governor on receiving the certificate of the trial judge and the medical superintendent of the state insane asylum, upon an examination made by them, after being duly summoned for that purpose by the prison directors, that the prisoner is no longer insane, has been condemned, not only upon the ground that it fails to furnish adequate means for the enforcement of the remedy provided, against the restraint being continued beyond the necessity which alone can justify it, but also upon the ground that it plainly violates the constitutional safe-

guard against restraints of personal liberty without "due process of law," the proceedings contemplated by it being not only inquisitorial and *ex parte*, but incapable of being set in motion except at the will of the prison directors, who would, therefore, practically control the liberty of the person: *Underwood v. People*, 32 Mich. 1; 20 Am. Rep. 633.

McDONOUGH v. LANPHER.

[55 MINNESOTA, 501.]

ELEVATORS—MASTER AND SERVANT—CARRIERS.—If a person using a whole building for his business permits, but does not require, his employees to ride up and down on a freight elevator used therein, they are, while so riding in going to and from work, employees, and not passengers. The degree of care required of a master toward his servant is imposed upon the employer in such a case, and not that of common carrier of passengers.

Kueffner, Fauntleroy & Searles, for the appellants.

Charles H. Taylor, for the respondent.

503 GILFILLAN, C. J. The action is to recover for a personal injury. The defendants were engaged in business as wholesale dealers in hats, caps, furs, gloves, etc., and manufacturing and repairing furs and fur garments, carrying on the business in a five-story building on Fourth street, St. Paul. In the building was an elevator, running from the lowest to the highest story. The elevator was not inclosed with any thing in the nature of wainscoting or boarding, but consisted of a platform or floor, with posts at the corners, and an intermediate post on each side extending up to the framework at the top. About three feet above the floor was a narrow strip of board on the sides, nailed to the posts, and another about three inches high from the edge of the platform. The plaintiff was working for defendants, and was employed with seventy-five or a hundred others in the fur department of the business, the work of which was done in the fifth story. The elevator was used for carrying freight, and the employees were permitted, especially when arriving in the morning and when quitting at night, but were not required, to ride up and down in it, to and from the stories where they worked. There were stairs which they could use if they chose. On arriving at the building one morning plaintiff took the elevator to ride up to the fifth story, and, on entering it, she rested her hand on the upper strip and

one foot on the lower, and, in ascending, the foot, which must have been in part outside the strip, was caught and injured by a joist or timber in one of the floors projecting inside the wall or casing of the elevator well or shaft, so as to come very near the edge of the elevator floor.

On the trial plaintiff had a verdict, and the appeal is from an order denying a new trial.

The appellants make several assignments of error, only one of which it is necessary to consider.

The court instructed the jury: "If you find that this elevator described in the testimony was used, with their knowledge and consent, as a passenger elevator, in that case the defendants were bound to the exercise of the highest human skill, foresight, and ⁵⁰⁴prudence in making the elevator safe for the purpose of transporting human beings from one portion of the building to another. So much for the obligation resting on the defendants in case you find this to have been a passenger elevator."

That is the degree of care required of a common carrier of passengers toward the passengers he carries. It is a higher degree than is required of a master toward his servant. That degree is stated in Cooley on Torts, page 567, thus: "The law does not require him to guaranty the prudence, skill, or fidelity of those from whom he obtains his tools or machinery, or the strength or fitness of the materials they make use of. If he employs such reasonable care and prudence in selecting or ordering what he requires in his business, as every prudent man is expected to employ in providing himself with the conveniences of his occupation, that is all that can be required of him": See *Gates v. Southern Minn. Ry. Co.*, 28 Minn. 110.

The rules are general, and, from considerations of convenience and public policy, there are no exceptions. There are sound reasons for requiring a higher degree of care in one case than in the other. An obvious one is, that, in the case of the passenger, he neither does know nor can know, nor is he called on to inform himself, whether the carrier employs competent and careful servants and fit and proper machinery and means for performing the service, but he commits himself unreservedly to the care of the carrier; while the servant in most cases may know, and, if the matter is open to ordinary observation, is bound to know, whether the machinery and appliances employed by the master be fit and proper.

As there cannot be two rules as to cases between master and servant, one applying to the use of one kind of machinery and another to another kind, it is evident that, if the relation between plaintiff and defendants at the time of the injury was only that of master and servant, the instruction was wrong. We suspect the court below was misled by some indefiniteness in the opinion in *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, which was not a case of master and servant, but of innkeeper and guest; and it was said: "The relation between the owner and manager of an elevator for passengers is similar to that between an ordinary common carrier of passengers and those carried by him." That would not be ⁵⁰⁵ applicable where a relation requiring a different degree of care exists, and the person is riding and being carried in that relation.

The question comes, then, to this: Was plaintiff, in riding in the elevator from the lower to the fifth story of the building, doing so as the defendants' servant, or was she riding as a passenger, being carried by them as a common carrier?

We find no case precisely similar in which that question was distinctly passed on. *Treadwell v. Whittier*, 80 Cal. 574, 13 Am. St. Rep. 175, was not a case of an employee, but of a customer, riding in an elevator. It was, therefore, not unlike *Goodsell v. Taylor*, 41 Minn. 207, 16 Am. St. Rep. 700, and the rule expressed in the latter case was applied. *Wise v. Ackerman*, 76 Md. 375, was the case of an employee, and the court, treating the plaintiff as in the elevator of an employee, and not as a passenger, stated the rule: "But an elevator is in many respects a dangerous machine, and, though it may be primarily intended only as a freight elevator, yet, if the employees, in the course of their employment, are authorized or directed to use the elevator as a means of personal transportation, the employer controlling the operation of the elevator is required to exercise great care and caution, both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate." This is considerably short of the degree of care required of a common carrier of passengers, and stated in the instruction of the court below—"the exercise of the highest human skill, foresight, and prudence." It is but the expression, in different terms, of the degree required of a master toward his servant; for an ordinarily prudent man employing a dangerous machine where human

life is risked will exercise great care and caution in respect to its construction and operation.

The only cases nearly analogous in which the question whether the person injured was a passenger or employee was passed on were cases where a railroad company was accustomed to carry their employees, without charge, to and fro between the place where they lived or boarded and the place where they worked for the company, and one of them was injured while riding to and from the place of work.

Of these cases *Gillenwater v. Madison etc. R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101, holds that the person so carried was a passenger. *Fitzpatrick v. New Albany* ⁵⁰⁶ *etc. R. R. Co.*, 7 Ind. 436, cited by respondent to the same point, does not so hold, the court saying: "He was not, it is true, a mere passenger. His travel on the cars was an incident to the business in which he was employed; but under an agreement with the defendants he was to be regularly conveyed to and from his work. This, it seems to us, is an implied engagement that they would convey him as safely and securely as if he really had been a passenger in the ordinary sense of the term." So far as that may mean that, though the person injured was not a passenger, but an employee at the time, there was such implied agreement, or any obligation of care other than that imposed by law upon a master toward his servant, the case stands alone; and we think the grounds on which the court made that remark were overruled in *Columbus etc. Ry. Co. v. Arnold*, 31 Ind. 174; 99 Am. Dec. 615. *State v. Western Maryland R. R. Co.*, 63 Md. 433, is an instructive case. The person killed was employed by the company as brakeman on a passenger train running in the morning from U. B. to B. C., and returning in the evening, every day, except Sundays. On arriving at U. B. Saturday nights the time was his own until Monday morning, when he was expected to be at U. B. to resume his duties. Sunday he took a train at U. B. to go to B. C., where his family resided, traveling on a pass which the conductor of his train held for himself and crew, and on that trip the decedent was killed in a collision. It did not appear that by the terms of his employment he was to be carried Saturday evening or Sunday from U. B. to B. C., and back again for Monday morning. The court reviewed most of the decisions to that time, and held the decedent was a passenger when killed, and said: "In whatever else they may differ these cases all agree upon one principle,

and that is that if the plaintiff is not, at the time of the accident, engaged in the actual service of the company, or in some way connected with such service, the company is liable for the negligence of its employees." *O'Donnell v. Allegheny V. R. R. Co.*, 59 Pa. St. 239, 98 Am. Dec. 336, held that a carpenter, who was to be carried to and from his place of work, was, while being so carried, a passenger.

On the other hand, holding that in cases of the kind the person is carried as an employee, and not as a passenger, are *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Seaver v. Boston etc. R. R. Co.*, 14 Gray, 466; *Russell* ⁵⁰⁷ *v. Hudson River R. R. Co.*, 17 N.Y. 134; *Ryan v. Cumberland V. R. R. Co.*, 23 Pa. St. 384; and *Kansas Pac. Ry. Co. v. Salmon*, 11 Kan. 83. *Rosenbaum v. St. Paul. etc. R. R. Co.*, 38 Minn. 173, 8 Am. St. Rep. 653, is really to the same effect. The company transported the employees daily from the boarding-car to their place of work and back again. The plaintiff, having returned to the boarding-car, found he had left his coat at the place of work, got upon a gravel train to go back and get it, and, while on it, was injured. If he got on the car as a passenger he was a trespasser, for the conductor had no authority to take passengers; but if he got on as an employee he was not, and the court held he was on the train as an employee.

There is, therefore, a considerable weight of authority in support of the proposition that in such cases the person is carried as an employee and not as a passenger.

And, in a case like this, reason would seem to point to the same result. State the matter to one not used to making hair-drawn distinctions, but to judging by the dictates of business common sense, and we do not think he would hesitate in arriving at that result.

In our opinion, from the time plaintiff entered the building for the purpose of going to work, she was there as an employee, whether she walked up the stairs or rode up in the elevator.

Order reversed.

ELEVATORS—DEGREE OF CARE REQUIRED IN RUNNING.—If an elevator is under the control of the owner of the building he is liable to his tenants for any injury caused by defects in it, or in its appointments or management, which reasonable care and vigilance can prevent: *People's Bank v. Morgolofski*, 75 Md. 432; 32 Am. St. Rep. 403. As opposed to the principal case, it is held in *Treadwell v. Whittier*, 80 Cal. 575, 13 Am. St. Rep. 175, that

the care and diligence expected of persons using an elevator in their place of business is the same as that resting on the carriers of passengers by a coach or railway.

ELEVATOR, EMPLOYEE RIDING IN ASSUMES RISK OF CONSTRUCTION AND OPERATION, WHEN.—An employee of defendant familiar with the construction and operation of its elevator used in its business only for transporting material, who rides thereon under an implied license, for his own pleasure and convenience, accepts whatever risk is incident to such construction and operation, and can only require of the defendant the use of ordinary care in its operation: *O'Brien v. Western Steel Co.*, 100 Mo. 182; 18 Am. St. Rep. 536.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

LOOKWOOD v. WABASH RAILROAD COMPANY.

[122 MISSOURI, 86.]

MUNICIPAL CORPORATIONS—CONTROL OF STREETS.—Under a city charter vesting sole power in the “mayor and assembly” to grant franchises to street railroads, such power to be exercised only by ordinance, a permit from the mayor alone to construct and operate a railroad in the street is void, and confers no authority on a railroad company to occupy the street with tracks.

MUNICIPAL CORPORATIONS—STREETS—RAILWAY AS ADDITIONAL USE.—Laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, does not subject the street to a public use different from that contemplated in the original grant.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—RIGHT TO CREATE NUISANCE.—A city cannot create a nuisance in its streets, or devote them or any part of them to a purpose inconsistent with the rights of the public or abutting property owners.

MUNICIPAL CORPORATIONS—CONTROL OF STREETS—RIGHT TO CREATE NUISANCE.—A city has no right to authorize the use of its streets for railroad purposes when such use necessarily destroys them as public ways, and deprives abutting owners of access to their property.

F. W. Lehmann and G. S. Grover, for the appellant.

L. Bell, for the respondents.

88 GANTT, P. J. This is a proceeding for injunction by plaintiffs who are abutting property owners on Collins street, in the city of St. Louis, between Franklin avenue and Carr street, to prevent the defendant, a steam railway company, from constructing, maintaining, and operating its railway along Collins street between Carr street and Franklin avenue, with a prayer for general relief.

The petition alleges that the plaintiffs are the owners of certain described property on Collins street, between Carr street and Franklin avenue. That this property is valuable, is worth more than thirty thousand dollars, and that its access to Collins street is an important element ⁸⁹ in its value, and that it is covered with permanent buildings. That the defendant, by ordinance of the city of St. Louis number 15,816, approved September 3, 1890, was granted permission to construct, maintain, and operate a branch of its road with a single track along Collins street, in front of the plaintiff's property, and elsewhere, as specified in the ordinance. The ordinance itself is set out *in hæc verba*. That Collins street, between Carr street and Franklin avenue, and in front of the plaintiffs' property, is a narrow street, having a width from building line to building line of forty feet, and a sidewalk on each side of the street eight feet in width, leaving a roadway of twenty-four feet.

That the defendant has constructed and laid down on the east half of the roadway of Collins street, in front of plaintiffs' property, a single railway track, under the alleged authority of the ordinance aforesaid, but has not, up to the time of the filing of the petition, commenced operating locomotives, cars, and trains thereon, and that it now threatens and purposes so to do, unless restrained by the process of the court. That the defendant is engaged in laying and constructing a second railway track on the west half of the roadway of Collins street, in front of plaintiffs' property, by virtue of a permit given by the mayor of the city of St. Louis, under date May 21, 1891. This permit is set out *in hæc verba*. That this permit has no legal force or effect, and is void.

That this construction, maintenance, and operation of said railway tracks, or either of them, along Collins street, in front of plaintiffs' property, will hinder and prevent the public from using the street, will exclude travel, passage, and business therefrom, will exclude all vehicles, and will destroy the use of the street as a public thoroughfare. And plaintiffs charge that the character of Collins street, between Carr street and ⁹⁰ Franklin avenue, is such that the railway tracks thereon, or either of them, cannot be operated without preventing the public from using the street, and that, under the law, the city of St. Louis cannot, nor can its mayor or municipal assembly, authorize such use of a street as will destroy its use as a public thoroughfare, and that ordinance

15,816, so far as it attempts to authorize the construction, maintenance, and operation of a steam railway track in Collins street, is absolutely null and void.

Plaintiffs state that by reason of the construction, maintenance, and operation of said railway tracks, or either of them, at the points named, their property will be greatly depreciated and damaged in its selling and rental value, and the damages which will accrue to them will differ in degree and kind from those which will accrue to other members of the community, or to the public at large, from the same causes. They pray, therefore, that the defendant may be forever enjoined from constructing, maintaining, and operating the said railway tracks, or either of them, along Collins street, between Carr street and Franklin avenue, and for such other relief as they may be entitled to.

To this petition the defendant filed an answer, in which it admits that it has a corporate existence as a railroad company under the laws of the state of Missouri, and that it is engaged in maintaining and operating a steam railway, as alleged in the petition. Every other matter contained and set forth in the petition is denied.

By way of further answer defendant states that the North Missouri Railroad Company was a railway corporation duly organized by special act of the general assembly of the state of Missouri, entitled "An act to incorporate the North Missouri Railroad Company," and approved March 3, 1851, and "An act to amend an ⁹¹ act entitled an 'Act to incorporate the North Missouri Railroad Company,'" which amendatory act was approved January 7, 1853. That under and by virtue of section 11 of said act of March 3, 1851, the North Missouri Railroad Company was duly empowered to build its railroad along and upon any street, or any road or wharf of any town or city, and over a stream or highway in the state of Missouri, and that under and by virtue of section 9 of the act of January 7, 1853, said company was authorized to locate, construct, and operate a railroad from the city of St. Charles to the northern boundary line of the state of Missouri, and from the city of St. Charles to any point in the city of St. Louis, and also to construct and operate lateral or branch railroads to any point. The answer alleges that the Wabash Railway Company is the successor to the North Missouri Railroad Company, and is entitled to all its rights, privileges, and franchises, and the various links in chain of

title from the North Missouri Railroad Company to the Wabash Railway Company are set forth in answer; but as no question is made in the case with respect to these, they need not be repeated here.

The answer also pleads and sets out ordinance of the city of St. Louis number 15,816 and the permit of the mayor, dated the twenty-first day of May, 1891. It is further set out that, in pursuance of the authority conferred by the special act of the legislature of the state of Missouri hereinbefore referred to, and by virtue of the general laws of the state, and the ordinance of the city of St. Louis, the defendant did construct and now operates a branch of its railroad in the state of Missouri, along and upon Collins street, in the city of St. Louis.

The plaintiff filed a reply, denying all the allegations of the answer, and affirmatively setting up that the special acts of the legislature pleaded in the answer constitute no defense to the plaintiff's cause of action,⁹³ because the defendant had so constructed its railroad along Collins street, from Carr street to Franklin avenue, that the public are prevented from using the street, and that it was forbidden to do this by the special acts of the legislature referred to.

Further, the reply sets up that the defendant is not entitled to construct railroad tracks on the streets of St. Louis without the consent of the city of St. Louis, given by ordinance, and that with such consent it cannot construct such tracks on any such streets if they will prevent the public from using them, and the ordinance and the mayor's permit referred to are invalid, because the railway of Collins street, between Carr street and Franklin avenue, to which wagons and vehicles are restricted and confined to their passage along the street, has a width of only twenty-four feet, and the effect of the railroad tracks thereon is to prevent the public from using the street and to destroy the same as a thoroughfare. Judgment is prayed for as in the petition.

This action was commenced in the circuit court of the city of St. Louis on June 1, 1891. No preliminary injunction was asked or obtained. The cause was heard in December, 1891, and on March 3, 1892, a decree was rendered perpetually enjoining the defendant from operating with cars and locomotives the said railway tracks on Collins street in the city of St. Louis, between Carr street and Franklin avenue. From that decree this appeal is taken.

The uncontroverted facts are that the plaintiffs' own property in St. Louis on the east side of Collins street, between Franklin avenue and Carr street, extending eastwardly to Second street, of the value of about thirty thousand dollars, covered by permanent structures and rented for business purposes. Collins street, between Franklin avenue and Carr street, has a width of forty feet ⁹³ between the building lines, with sidewalks eight feet wide on each side, with a roadway only twenty-four feet in width. The Wabash Railway Company is a railroad corporation organized under the general railroad law of this state in 1889, and is the grantee of the North Missouri Railroad Company, which was chartered by special act of the general assembly, March 3, 1851.

Between the institution of this action and the trial in the circuit court the defendant laid its railroad tracks in Collins street, and employed the street to receive and discharge passengers from its passenger trains. It claimed the right to do this under the charter of the North Missouri Railroad, its predecessor, and under an ordinance of the municipal assembly of St. Louis, number 15,816, approved September 3, 1890, and under the permit of the mayor of St. Louis of date May 21, 1891. In front of the plaintiffs' property the defendant laid a double track for its railway, along Collins street. The distance between the east rail and the curbstone in front of respondents' property is three feet and six inches, as to one lot of ground, and three feet eight inches as to the other. The tracks are seven feet apart, and on the west side of the street the western rail is three feet and four inches from the curb line. From Carr street southwardly one hundred and twenty-five feet the track is a single track in the center of the street to a switch and thence southwardly with a double track four hundred and eighty-four feet to a switch, and thence two hundred and sixty-five feet southwardly with a single track to Franklin avenue, the southern terminus of the road. There are seven trains a day operated over this line, namely: At 7 o'clock, 8, 8:45, and 10:45 in the forenoon; and at 4, 5:45, and 6 o'clock in the afternoon. Each train occupies the street for twenty or thirty minutes, and is switched as it comes in, making use of the two tracks for the purpose. ⁹⁴ There is a night train at 11 o'clock on two evenings of the week, on which occasions the train stands in the street from 8 to 11 o'clock.

The testimony is uncontradicted and convincing to the

effect that traffic is excluded from the street during the occupation of the same by the cars, and that the business of the railroad company and of the public cannot be carried on there at the same time. When the railroad company makes use of the street the public traffic by all others is excluded, and this covers a period of three and one-half hours every day between 7 A. M. and 6 P. M. The two cannot exist and be carried on at the same time. Where the single track exists the space between it and the sidewalk is nine feet and a fraction, and freight-wagons cannot pass a train on this single track with safety. It also appears that respondents' property is damaged in its rental and salable value by the presence of the cars on the street. The tracks are laid to the grade of the street, and constitute no material obstruction save when occupied by trains.

There is nothing in the ordinance limiting the company's right to run trains at any and all times of day or night. The ordinance number 15,816 authorizes the company to construct, maintain, and operate a branch of its railroad with single track and necessary sidings and turnouts over the following route:

"Along Second street, crossing North Market, Monroe, Exchange, Madison, Chambers, Tyler, La Beaume, Bogy, Mound, Howard, and Mullanphy streets, across city block 264, across Florida street, thence down Collins street, across Cass avenue, Bates, O'Fallon, Ashley, Biddle, Carr, and Cherry streets, through the alley in block 68, across Morgan, through the alley in block 67, across Christy avenue, and across ⁹⁵ block 66, and all intervening alleys, to a proper connection with the tracks of the St. Louis Bridge and Tunnel Railway Company.

"The construction of the aforesaid tracks shall be subject to the approval of the street commissioner, and said tracks shall be laid to conform to the grade of the streets and alleys so crossed and occupied."

The mayor's permit was as follows:

"MAYOR'S OFFICE,
"ST. LOUIS, Mo., May 21, 1891. }

"To whom it may concern:

"Permission and authority are hereby given the Wabash Railroad Company to construct, maintain, and operate a siding and turnout in Collins street, between Carr street and Franklin avenue, as per accompanying plat. Said company

to construct, lay, and maintain said switch and turnout in conformity with all grades, in such manner and subject in all things to the satisfaction and approval of the street commissioner. Notification of commencement of work to be sent to street department. This permit subject to revocation at any time, whereupon said siding and turnout shall be removed, and the street restored by said railroad company.

“EDW. A. NOONAN, Mayor.”

1. The mayor's permit alone conferred no authority on defendant to occupy the street with railroad tracks and operate trains drawn by locomotives over it. The sole power to grant such a franchise is vested in “the mayor and assembly,” by section 26, paragraph 11, article 3, of the scheme and charter, and can be exercised only by an ordinance duly enacted for that purpose, and the Revised Statutes of the state, chapter 42, article 2, under which defendant was organized did not “authorize the construction of any railroad not already located in, upon, or across any street in a city or road of any county, without the assent of the corporate authorities of said city”: Rev. Stats. 1889, sec. 2543, pt. 4.

The purchase by the defendant of the property and franchises of the North Missouri Railroad did not exempt it from this provision of its own charter: *Owen v. St. Louis etc. Ry. Co.*, 83 Mo. 454. The most that it acquired by the purchase of the North Missouri in this connection was the right to continue the use of such tracks as were laid by its predecessor during the time it had a right to exercise its franchise. This new branch or spur was constructed by itself, and its right to do so must be found in the law under which it was created: *St. Louis v. Missouri Pac. Ry. Co.*, 114 Mo. 13.

Section 2543 provides that, when a railroad builds its track in a public street by permission of the city authorities, it must restore the street to its former state or to such a state as not necessarily to have impaired its usefulness. By its charter the mayor and the assembly of the city of St. Louis have power within the city, “by ordinance not inconsistent with the constitution or any law of this state” or of its charter, to regulate the use of the streets of the city, and “to grant to persons or corporations the right to construct railways in the city, subject to the right to amend, alter, or repeal any such grant, in whole or in part, and to regulate and control the same, as to their fares, hours, and frequency of trips, and

the repair of their tracks, and the kind of their rails and vehicles": Scheme and Charter, art. 2, sec. 26, par. 11.

It will be observed that the railroad is limited to the permission given it by ordinance, and the mayor and assembly of the city are restricted in their grant by the constitution and laws of this state. Subject to this ⁹⁷ limitation, it is the settled law of this state that a city may permit and authorize by ordinance, the laying of a railroad track along its streets. Beginning with *Lackland v. North Missouri R. R. Co.*, 31 Mo. 183, this court has uniformly held that laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, was not subjecting the street to a public use different from that contemplated in the original grant.

This proposition was most ably and strenuously attacked in *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706; but we felt constrained by the unbroken line of decisions to adhere to it: *Porter v. North Missouri R. R. Co.*, 33 Mo. 128; *Cross v. St. Louis etc. Ry. Co.*, 77 Mo. 321; *Smith v. Kansas City etc. Ry. Co.*, 98 Mo. 24; *Kansas City etc. R. R. Co. v. St. Joseph etc. R. R. Co.*, 97 Mo. 469; *Rude v. St. Louis*, 93 Mo. 408.

This proposition unqualified leads to this conclusion: A city may authorize a steam railroad to occupy a street with its tracks and operate its trains over it. The abutting proprietors cannot recover damages for the injury resulting to their property, although it is subject to smoke, noise, and cinders, at all hours of day and night, and all ingress or egress for the legitimate purposes of business is cut off, except at such times as the railroad may elect not to run trains upon it. Debarred from redress in that direction, they apply to a court of equity to restrain what they conceive is a public and private nuisance, and ask for protection of their own right to use the street, as abutting owners, and are met with the assertion that what the law itself licenses cannot be a nuisance, and that they must submit to whatever inconvenience ensues because they might have anticipated that the street would be subjected to this servitude when they purchased their property. If these propositions are true, then it results that an abutting property owner on a street may have ⁹⁸ his property damaged or destroyed without redress, notwithstanding the constitutional guarantee "that

private property shall not be taken or damaged for public use without just compensation."

But, while it has been said that a city might authorize a railroad company to lay its tracks in its streets, it has also been determined by this court and many others that the city could not, in the exercise of this power, create a nuisance in the streets, or devote them, or any part of them, to a purpose inconsistent with the rights of the public or abutting property owners. Thus, in *Dubach v. Hannibal etc. R. R. Co.*, 89 Mo. 483, Judge Henry, speaking for the whole court, said: "If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done. Nor is it competent for a city to authorize such use of a street dedicated as a street as will destroy it as a thoroughfare for the public use."

In this case it is too plain to be evaded that the grant conferred by this ordinance practically creates a monopoly in defendant in the use of this street. No restriction is placed upon the number of trains or the time within which they may be operated. The roadway is only twenty-four feet. In this narrow space defendant has been permitted, under this ordinance, to lay two tracks, each four feet eight inches wide. The distance between the east rail and the curbstone in front of plaintiff's property is three feet and six inches as to one lot, and three feet eight inches as to the other. The tracks are seven feet apart, and on the west side of the street the western rail is three feet and four inches from the curb line. These double tracks extended a distance of four hundred and eighty-four feet, with switches at either end. The company has stopped at ●● Franklin avenue and receives and discharges its passengers in the street at this point. At the time of the trial it was operating four trains in the forenoon, to wit: at 7 o'clock, 8 o'clock, 8:45, and 10:45 o'clock respectively.

That the defendant regards its right in that street as paramount to the plaintiffs' and the public is very evident, from the testimony of Mr. Blake, the president of the Sligo Iron Store Company, which occupies numbers 945 and 953 Second street, extending back to Collins street. He testifies that the operation of the road had caused a serious damage to his company; that on one occasion they had a load of angle iron

which was so long that they were compelled to use an extra set of wheels to keep it from dragging; the team had driven up to their doors on Collins street, and they were unloading it; a train of defendant came in, and the trainmen directed the iron company to move its wagon, and were told they could not do it, and the railroad company's agents procured a policeman, who compelled them to move the wagon. They could not turn around, the street was too narrow, and were compelled to pull the load around the block.

In many cases it has been said that the railroad company occupied the street along with the public, but it is perfectly plain that in this case no wagon of ordinary width can pass on this street with safety when the trains of defendant are on it, even where it had only a single track. On one occasion it seems that the steps of the cars were torn off in attempting to pass a wagon. The business on Collins street is wholesale, from Carr to Franklin avenue; the wagons used are seven feet three and one-half inches from "point of hub to point of hub."

Now, while it is true that the public must submit to all reasonable inconveniences in the highways, yet ¹⁰⁰ the highways are created for the public and abutting owners, and they have an unquestionable right to require a reasonable use by all who are entitled to use them. As was said by this court in *Schopp v. St. Louis*, 117 Mo. 131: "The 'public highways belong, from side to side and end to end, to the public,' and 'the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and the abutting property owner has the right to the free and unobstructed passage to and from his property."

Said Lord Ellenborough in *Rex v. Cross*, 3 Camp. 224: "And is there any doubt that if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance"? Every time the defendant uses this street with its trains it absolutely deprives all teamsters of ordinary freight-wagons access to this street, and, as the ordinance gives defendant the privilege of using it with its trains as often as it pleases, such use is utterly incompatible with the purposes for which

this street was created, and is unreasonable. The municipal assembly had no right to appropriate this street to defendant's use in this way.

The learned counsel made the distinction that the mere unlawful use by it of its franchise would not justify this action. We agree with him that we do not think the assembly anticipated that the company would, under this ordinance, use the streets as a depot, ground for the reception and discharge of passengers, and we are clear that the ordinance is no justification for such a use: *Lackland v. North Missouri R. R. Co.*, 31 Mo. 183. And this use, of itself, was good ground for an injunction ¹⁰¹ by an abutting owner. But we are satisfied that the maintenance of this steam railroad in this narrow highway, devoted as it has been to wholesale business requiring heavy, broad trucks and wagons, must necessarily result in denying the public and the abutting owners the right to use this street as they are entitled to under the laws of this state, and that the ordinance virtually destroys it for street purposes, and therefore the assembly had no power to enact it. It was an attempt to convert it to a use different from that for which the city acquired it, and is in contravention of its charter, which declares that "no railroad shall be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass," and the general law of the state that prohibits a railroad from impairing the usefulness of any street.

The learned counsel urges with great force and plausibility that this railroad is a public use of the street, but it seems to us he ignores the fact that, while the railroad is a public carrier, it has no right to the exclusive use of a public street, and such for all practicable purposes is the effect of this ordinance and its use of this street. No case in this state is authority for such exclusive use of a highway, and, if it was, we should not follow it. The company is a common carrier, and entitled as such to collect tolls, but not the exclusive right to monopolize a public street, and shut out the public and other carriers.

Holding as we do that this ordinance, in view of the facts developed, amounts to a practical condemnation of this portion of Collins street to the private and almost exclusive use of defendant, we think the injunction was properly granted by the circuit court, and plaintiffs had such an interest as

would enable them to maintain the action: *Schopp v. St. Louis*, 117 Mo. 131.

The judgment is affirmed.

All of this division concur.

RAILROADS IN STREETS—WHETHER ADDITIONAL SERVITUDE.—The authorized construction of a railroad upon a public street which injuriously affects the adjacent owner by interfering with the access to his real property, or the exclusion of light and air therefrom, imposes an additional servitude for which he may recover damages: *Jones v. Erie etc. R. R. Co.*, 151 Pa. St. 30; 31 Am. St. Rep. 722, and note. The use of a steam railway upon a street is a perversion of the street from its original and proper public purposes, and an abutting owner may recover damages for the same: *White v. Northwestern etc. R. R. Co.*, 113 N. C. 610; 37 Am. St. Rep. 639, and note. *Contra*, see *Gaus v. St. Louis etc. R. R. Co.*, 113 Mo. 308; 35 Am. St. Rep. 706, and note. See, also, the note *Evans v. Chicago etc. Ry. Co.*, 39 Am. St. Rep. 912, and the extended notes to *Goddard v. Inhabitants*, 30 Am. St. Rep. 397; and *Attorney General v. Metropolitan R. R. Co.*, 28 Am. Rep. 267.

MUNICIPAL CORPORATIONS—POWER TO AUTHORIZE NUISANCES IN STREETS. A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions in the public streets for purely private purposes: *Savage v. Salem*, 23 Or. 381; 37 Am. St. Rep. 688, and note. See, also, the extended note to *Goddard v. Inhabitants*, 30 Am. St. Rep. 396.

LA GRANGE BUTTER TUB COMPANY v. NATIONAL BANK OF COMMERCE.

[122 MISSOURI, 154.]

CORPORATIONS—INSOLVENCY—PREFERENCES.—A creditor, not a director, who has no interest in an insolvent corporation other than that of its creditor, is not a trustee, and has the right to sue by attachment, and thus acquire a superior lien to any and all other creditors, although advised to attach by a director of the corporation.

CORPORATIONS—INSOLVENCY—PREFERENCES IN EQUITY.—A court of equity having acquired jurisdiction of an insolvent corporation for the purpose of administering its estate, is bound to respect legal rights and preferences already acquired, and to make distribution accordingly.

CORPORATIONS—INSOLVENCY—ASSETS AS TRUST FUND.—The assets of an insolvent corporation are trust funds for the benefit of all its creditors in so far as to prohibit the disposition of its assets toward the payment of debts due its officers, or by securing such debts by creating liens so as to thereby give them a preference over other creditors, or from the time when a court of equity acquires jurisdiction over it for the purpose of winding up its affairs and distributing the proceeds arising from a sale of the assets equitably among the creditors.

W. C. & J. C. Jones, for the appellant.

A. Arnstein, for the respondents.

¹⁵⁶ BURGESS, J. This is a proceeding by petition in the nature of a creditor's bill, brought on behalf of plaintiff and all other creditors of the Batchelder Egg Case Company, its object being to subject \$5,000 in the hands of the defendant the National Bank of Commerce, to the payment of the general indebtedness of the Batchelder Egg Case Company, and to restrain the sheriff from paying the same to the defendant bank.

The Batchelder Egg Case Company was incorporated under the laws of this state. On August 16, 1890, it owed the Bank of Commerce \$65,000. On that day the company owned a box-mill in Arkansas, which was afterward sold for \$31,000; a stock of goods in St. Louis, worth about \$7,000; and a stock of goods in Chicago, worth about \$3,000. It owned no other property. Its bills receivable did not exceed \$1,500, while its aggregate indebtedness was \$130,000. It owed the plaintiff something like \$2,000, and various parties sums amounting to about \$10,000, which was ¹⁵⁷ past due, and for which the Egg Case company was being hard pressed. The cash on hand did not amount to exceeding \$200 or \$300. On the night of August 16th the company completed arrangements to sell out its Chicago stock to the Creamery Package Company, which was closed on the following Monday, the 18th. On the 16th, which was Saturday, the Egg Case company employed Mr. Douglass, an attorney at St. Louis, to go to Helena, and there make a bill of sale to the defendant bank of its Helena plant, or run an attachment against the plant in favor of the defendant bank. On the morning of the 18th, between 7 and 8 o'clock, Clark, the cashier and one of the directors of the Egg Case company, went with Paxton, the company's St. Louis attorney, to the defendant bank, and told the cashier that the company was in bad shape, and that they thought it best for him to bring an attachment on the stock of goods at 935 North Main street. The stock of goods was the same day attached by defendant bank. Other creditors of the Egg Case company ran attachments, but the assets in St. Louis were absorbed by the first attachment, that of defendant bank. The bank realized nothing from the Arkansas property, as that had been absorbed by other creditors.

The evidence further shows that J. H. Batchelder and Mark D. Batchelder, the president and secretary of the Egg Case company, had, during the week prior to the failure,

concealed the funds belonging to the company to the extent of at least \$3,000; "they put it in their pockets." Part of the money so concealed by them was the proceeds of the draft which the bank had cashed for the company on the Friday preceding. The proceeds of the merchandise sold in Chicago—\$3,000—were never accounted for.

The Egg Case company made no defense to the ¹⁵⁸ attachment suit instituted by the bank, but plaintiff offered to show that it did defend the suits brought by the other St. Louis creditors. The testimony was excluded by the court.

On final hearing the bill was dismissed, and plaintiff appeals to this court.

While it may be conceded that corporate assets are regarded as a trust fund for the benefit of all the corporation creditors, the rule, as announced by this court in *Foster v. Mullanphy Planing Mill Co.*, 92 Mo. 79, is that a corporation may, when acting within the scope of the purpose for which it was incorporated, do any act in furtherance of those purposes, and, although insolvent, it may prefer some creditors to others, even though such creditors be among the directors of the corporation, providing such preference is made in good faith and to a *bona fide* creditor. This rule only applies to the acts of the corporation while it is a going concern, and before it has gone into the hands of a receiver, or liens have attached to the corporate property.

It is true, as held in *Roan v. Winn*, 93 Mo. 503, and authorities cited, that after confessed insolvency the directors of a corporation cannot in equity secure any advantages to themselves. This is because they represent all the creditors, and occupy the position of trustees toward them; and a trustee, or a person standing in a similar or fiduciary relation, will not in equity be allowed to take advantage of his position, exercise his power, or to manage or appropriate the property of which he has the control for his own profit and to his own advantage, at the expense of those for whom he is acting.

But a creditor, not a director, and one who has no interest in the corporation other than that of a creditor, occupies a very different position. He is not a trustee, and, in his efforts to collect his debt, is representing no ¹⁵⁹ one but himself. The mere insolvency of the corporation did not have the effect of depriving the defendant bank of its legal remedies and the right to sue by attachment, and thus acquire a superior lien to any and all other creditors, if fortu-

nate enough to do so and it felt so inclined. In doing so it merely pursued a remedy that the law provided for it and others similarly situated, and it was certainly guilty of no fraud or unfairness in doing that which the law provided that it might do.

As was said in *Roseboom v. Whittaker*, 132 Ill. 81: "Appellants insist that, if the corporate assets became a trust fund for the payment of the corporate debts, the instant the corporation became insolvent said assets became a trust fund for the payment of all the debts *pro rata*, and that the decree, therefore, is erroneous in giving the judgments in the attachment suits a preference over the claims of other creditors. The attachment suits were commenced, and the attachment writs levied, before the filing of the original bill, and before the jurisdiction of a court of equity was invoked for the purpose of taking into its hands the corporate assets and administering them upon equitable principles. The mere insolvency of a corporation cannot have the effect of depriving creditors of their legal remedies, but they are at liberty, notwithstanding the insolvency, to sue the corporation in an action at law, and by means of such proceeding establish a specific lien upon the property seized by attachment or execution. Such lien, when perfected, will doubtless entitle the creditor acquiring it to a preference over other unsecured creditors. After the aid of a court of equity has been invoked, and that court has taken the assets of the insolvent into its hands, its jurisdiction becomes necessarily exclusive, and it will proceed, in administering the insolvent estate, upon the maxim that equality is ¹⁶⁰ equity. After that jurisdiction has attached, ordinarily, no creditor can pursue a legal remedy, at least, in such way as to obtain for himself a preference. But the court of equity is bound to respect legal rights and preferences already acquired, and to make distribution accordingly."

There was no fraudulent collusion shown to have existed between the officers of the Egg Case company and the defendant bank in order to give it a preference over others of its creditors. The mere fact that Clark, the cashier, and one of the directors of that company, stated to the officers of the defendant bank that they were in bad shape and that they had better attach the St. Louis property, did not show such fraud.

The assets of the insolvent corporation are trust funds for

the benefit of all its creditors, in so far as to prohibit the disposition of its assets toward the payment of debts due its officers, or by securing such debts by creating liens to secure the payment thereof so as to thereby give them a preference over other creditors, or from the time when a court of equity acquires jurisdiction over it for the purpose of winding up its affairs and distributing the proceeds arising from a sale of the assets equitably among the creditors.

In case of an insolvent partnership a court of equity will make distribution of the partnership assets *pro rata* among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense and upon this principle that the assets are trust funds. They are trust funds when a court of equity is appealed to in behalf of any member of the corporation, or creditor, to protect and distribute the assets upon equitable principles, but there is no rule which makes them trust funds in any other sense than as hereinbefore stated, nor is there any law or rule in equity which prohibits any creditor of the corporation ¹⁶¹ from obtaining a lien upon the assets by due process of law, by a hostile proceeding: *Van Alstyne v. Cook*, 25 N. Y. 489; *Roseboom v. Whittaker*, 132 Ill. 81.

There are courts of high authority, notably Tennessee, which hold that after a corporation has become insolvent and ceased to be a going concern, then the assets must be distributed *pro rata* among all the creditors, and that no creditor can acquire a prior lien over others, by reason of the seizure of the corporate property under attachment or execution in his favor: *Smith v. Insurance Co.*, 3 Tenn. Ch. 502, *Marr v. Bank of West Tennessee*, 4 Cold. 471. We feel inclined, however, to follow the rule as announced by the courts of New York and Illinois, believing them, as we do, to be in accordance with the weight of authority.

With the concurrence of the other judges of this division the judgment of the circuit court is affirmed.

CORPORATIONS—INSOLVENCY—PREFERENCES.—The right of insolvent corporations to make preferences among its creditors is discussed in *Worthen v. Griffith*, 59 Ark. 562; *ante*, p. 50, and note.

CORPORATIONS—INSOLVENCY.—Assets as trust fund: See *Worthen v. Griffith*, 59 Ark. 562; *ante*, p. 50, and note.

RUSSELL v. GRANT.

[122 MISSOURI, 161.]

MECHANICS' LIENS—PARTIES.—A mortgagee of land on which a building is erected subsequently to the mortgage is not bound or affected by proceedings to enforce a mechanic's lien against the building unless made a party.

MECHANICS' LIENS—MORTGAGE—PRIORITY.—The lien of a mortgage for the purchase price of land cannot be displaced or postponed by a mechanic's lien for material furnished for a building thereon which attaches simultaneously with the acquisition of title by the mortgagor and the execution of the mortgage.

MECHANICS' LIENS—JUDGMENT OF FORECLOSURE—PARTIES.—No valid judgment can be rendered establishing and foreclosing a mechanic's lien, unless the contractor who erected the building is made a party.

JUDGMENTS ON VOID PROCESS.—A judgment by default, based on the return of an officer made outside the state, and shown to be invalid under the laws of that state, is null and void.

MECHANICS' LIENS—JUDGMENT OF FORECLOSURE—COLLATERAL ATTACK.—A stranger whose interests are about to be prejudiced by the enforcement of a judgment foreclosing a mechanic's lien may show that it was rendered without jurisdiction.

MECHANICS' LIEN—SUIT INTER PARTES.—A proceeding to enforce a mechanic's lien is a suit *inter partes*, and not *in rem*.

APPLICATION for an injunction to prevent the removal of houses from certain land. On October 6, 1888, J. T. Holmes was the owner of the land in dispute. For some days prior thereto negotiations had been pending between him and J. Goodin for a sale of the land to the latter, and negotiations had been pending between the latter and Joel Harford for a sale of the land to the latter, and between the latter and Harkness & Russell for a loan from the latter on the property. On the day mentioned the negotiations were completed, and Harford and wife executed and delivered to Harkness & Russell a deed of trust, dated October 4, 1888, conveying the land to L. A. Laughlin, trustee, to secure a note for seven thousand and fifty dollars, at ninety days. Harkness & Russell, at that time, paid on Harford's account, two thousand two hundred dollars of the loan to Goodin as part of the purchase price, and the latter paid part of it to Holmes, and received from the latter and his wife a warranty deed. On the same day Goodin delivered to Harkness & Russell the Holmes deed and the deed from himself and wife to Harford. On October 8, 1888, Harkness & Russell delivered all three of the deeds to the county recorder, simultaneously, to be recorded. The lumber to build the

houses began to be delivered contemporaneously with the filing of the deeds for record. Harford erected six houses on the land, and the balance of the loan made by Harkness & Russell was paid out by them on orders from Harford for labor and material used in the construction of such houses. On February 19, 1889, the Interstate Lumber Company filed a mechanic's lien against the property for such labor and material, amounting to two thousand four hundred and sixty dollars and seventy-nine cents, and on that day began proceedings to foreclose the lien, making Harford, Goodin, Harkness & Russell defendants. The petition, among other things, alleged that a note was given by Harford and Goodin to the plaintiff for two thousand four hundred and fifteen dollars and five cents, at sixty days, for a part of the account sued on. Summons was personally served on Goodin, Harkness & Russell, in Missouri, on February 20, 1889. An *alias* summons was issued, and served on Harford, in Franklin county, Kansas, on July 24, 1889, by the sheriff of that county. "The return does not show that the affidavit of service is made before the clerk of the court of which affiant is an officer; nor does the evidence show that the court of which the clerk certifies was a court of record." On April 8, 1889, Harkness & Russell filed an answer, alleging their interest in the premises to be as beneficiaries in the deed of trust from Harford, and that such interest was acquired prior to the erection of the houses. Goodin and Harford made default. When the case came on for trial the suit was dismissed as to Harkness & Russell, and plaintiff obtained a personal judgment against Harford for two thousand six hundred and seventeen dollars and five cents, and established the demand as a lien against the real estate and improvements. Execution issued under this judgment December 21, 1889, and the sheriff advertised the lots and improvements to be sold on May 23, 1890. On May 16, 1890, Russell, who had purchased the property on March 9, 1889, petitioned the court for an injunction to prevent the sale. On May 24, 1889, a temporary injunction theretofore granted was dissolved, and the petition dismissed. On June 20, 1890, the execution was returned unsatisfied. On May 26, 1890, Goodin filed a motion to set aside the judgment against him for irregularity, and on May 29, 1890, Harford filed a motion to modify the judgment. On May 31, 1890, the court modified the judgment by setting aside

the personal judgment as to Goodin and establishing the lien against the houses only. At the time the judgment was so modified no notice was given to any one but Harford and Goodin. On June 21, 1890, another execution was issued, and levied on the houses, and after twenty days' notice the sheriff sold them on July 29, 1890, to M. R. Grant, who purchased for the Interstate Lumber Company. The note for seven thousand and fifty dollars, given by Harford to Harkness & Russell, and secured by deed of trust, was not paid at maturity; consequently the trustee, Laughlin, advertised and sold the property under the trust deed on February 28, 1889, for two thousand five hundred dollars, to C. T. C. White, who, on March 9, 1889, sold the property to Russell for twenty-five thousand dollars. From this time until the commencement of this suit Russell was in possession of the property. On September 3, 1890, Grant and his workmen came upon the premises, tore out the foundation from one of the houses, with the avowed intention of moving it and the other houses off from the lots. Russell then filed his petition for an injunction to prevent such removal. A temporary injunction was granted, and on final hearing was made perpetual. Defendant Grant then appealed.

Kagy & Bremermann, for the appellant.

L. A. Laughlin and Lathrop, Morrow & Fox, for the respondent.

¹⁷² SHERWOOD, J. 1. Our statute in relation to mechanics' liens provides that: "The lien for the things aforesaid or work shall attach to the buildings, erections, or improvements for which they were furnished or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon ¹⁷³ which said buildings, erections, improvements, or machinery have been erected or put; and any person enforcing such lien may have such building, erection, or improvement sold under execution, and the purchaser may remove the same within a reasonable time thereafter": Rev. Stats. 1889, sec. 6707.

"The lien for work and materials as aforesaid shall be preferred to all other encumbrances which may be attached to or upon such buildings, bridges, or other improvements, or the ground, or either of them, subsequent to the commencement of such buildings or improvements": Rev. Stats. 1889, sec. 6711.

"In all suits under this article the parties to the contract shall, and all other parties interested in the matter in controversy, or in the property charged with the lien may, be made parties, but such as are not made parties shall not be bound by any such proceedings": Rev. Stats. 1889, sec. 6713.

Under the first quoted section the priority of a mortgage on the land would still allow the mechanic lienor a priority over the improvements put upon the land, while, by the terms of section 6711, a mechanic's lien would enjoy preference and priority both as to land and improvements over a subsequent mortgage. But, whether the mechanic's lien have priority of the mortgage, or *vice versa*, the necessity for the lienor when proceeding to establish and to foreclose his lien (for the process is a twofold one) to make the mortgagee a party would seem to be most obvious. And this is true, notwithstanding the singularly worded provisions of section 6713 of the Revised Statutes of 1889.

That no one can be passed on in person or estate without an opportunity afforded him to be heard is axiomatic. If the section in question had been entirely silent as to making parties to the proceedings other than those who are parties to the contract, still the law ¹⁷⁴ would intend that such noncontracting parties should be brought in before their rights could be passed upon. Cases abound in this state and elsewhere announcing this fundamental and wholesome doctrine of the essential nature of notice to the party to be affected, and that that notice will be implied, though the statute be silent on the point: *Laughlin v. Fairbanks*, 8 Mo. 370; *Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152; *State v. Board of Equalization*, 108 Mo. 235; *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663; Sutherland on Statutory Construction, sec. 334, and cases cited. Provision for notice is part and parcel of "due process of law": Cooley on Taxation, 2d ed., 363, 364.

In *Hassall v. Wilcox*, 130 U. S. 493, a ruling was made quite *apropos* the point in hand; there the state law made no provision for notice to other lienholders, but provided that such lienholders might intervene and become parties to a suit instituted in the state court, and gave the holder of a mechanic's lien priority over all other liens, and though a suit was brought in the state court and judgment recovered by the mechanic lienholder against the railroad property, yet it was held that as to a plaintiff lienor under a mortgage

not made a party to such proceeding, the judgment in the state court could not operate even as *prima facie* evidence against the mortgage lienor, and might be questioned by him in the federal court in a proceeding in that court to foreclose the mortgage. In that case the former ruling of *Windsor v. McVeigh*, 93 U. S. 274, is cited with approval, where it is held that even in a proceeding *in rem* some form of notice is as essential and indispensable as in other cases.

Take the case of a mortgagee who holds a mortgage on certain land; afterward a building is erected thereon, and a lien paper is filed against that building. ¹⁷⁵ If that lien paper is in any sense invalid, or suit be not brought thereon in time, then the mortgagor becomes the absolute owner of the building, subject, however, to the rights of the mortgagee who has rights superior to those of the lien debtor, and therefore has a right to be heard when the mechanic's lienor attempts to establish his lien against the building or against both building and land and to foreclose the same; because, peradventure, he may be able to show invalidating facts, to wit, that the lien paper was not filed in time; that it was not properly itemized; or not properly authenticated; or suit not brought within the proper time. All these and other invalidating facts are open to the mortgagee, whether prior or subsequent, to prove. If he prove any one of them he defeats the establishment of the lien, and also its foreclosure. In order that he may do this an opportunity to be heard is a *sine qua non*, and must be given him. Unless this opportunity be afforded him, he is not "bound," that is, "affected," thereby, or as said by Wagner, J., in similar circumstances: "As Clark [the beneficiary] was not made a party to the proceedings for the enforcement of the mechanic's lien, he was a stranger to them, and they have no force or effect upon him": *Crandall v. Cooper*, 62 Mo. 480.

In this connection it is proper to remark that a mechanic's lien is wholly unlike a contract lien, in that the former is inchoate, and has no existence until established by the judgment of the court, but the contract lien binds upon being delivered and recorded. The contract lien cannot be gainsaid; it dates from its registry, while the mechanic's lien dates from the date of the rendition of the judgment which establishes it and into which it becomes merged. In order to prevent the establishment of this lien, in order to show it cannot legally be established on property in which ¹⁷⁶ he is

interested, and of which he is the conditional, and may become the absolute, owner, the mortgage lienor has a right to be heard. In the language of Judge Richardson, in *Clark v. Brown*, 25 Mo. 560, in a similar case, "the law repudiates the idea of condemning the property of one man to pay the debt of another, without giving him an opportunity in court, upon due service of process, of showing that the claim ought not to be asserted against his property."

The latter portion of the opinion in *Crandall v. Cooper*, 62 Mo. 480, has given rise to some misapprehension, to wit: "The purchaser might have bought the erections and improvements freed from all liens, and would have been entitled to recover them, and this is all that he could have acquired." This remark, in the first place, was *obiter*, because the purchaser had not bought the improvements. The case had already been disposed of on a contract basis, and what Judge Wagner evidently meant, having previously referred to the statute requiring notice, was this: "If Clark had been a party to the lien suit, he would have been bound thereby, and the purchaser might have bought the improvements," etc. Construing the case in this way, it gives effect to section 6713, in its entirety, and prevents any intended or attempted wrong, and affords no opportunity for the perpetration of any injustice.

And in this connection it is well enough to say that the fact that the prior mortgage lienor had previously bought in the property under the deed of trust does not diminish his right to be heard when the suit to establish and foreclose the mechanic's lien comes on, because, even then, he has a right to be heard in order that he may protect his property from the assertion and establishment of an unjust or nonexistent lien.

The doctrine in *Crandall v. Cooper*, 62 Mo. 480, affirmed in *Coe v. Ritter*, 86 Mo. 277, has recently been reaffirmed by ¹⁷⁷ division number 1 of this court in *Hicks v. Scofield*, 121 Mo. 381.

2. In the foregoing remarks the lien of Harkness & Russell has been treated as the prior one, and so it should be treated, and for these reasons:

(a) Under the provisions of section 6706 of the Revised Statutes of 1889 the mechanic's lien attaches "to the extent and only to the extent of all the right, title, and interest owned therein by the owner," etc. In the case at bar, as

already seen, the deed to Harford was never delivered to him, but all the deeds from Holmes to Goodin, from the latter to Harford, and the deed of trust from the last named to Harkness & Russell, were all handed Harkness & Russell on the 6th of October, 1888, who, on the 8th of October next thereafter, handed them all to the recorder for recording. Harford never acquired any title before that time. It does not clearly appear when the first load of lumber was delivered on the premises by the Interstate Lumber Company; the best that can be said about it is, that it was delivered about 9 A. M. on the same morning the deeds were put to record. If this delivery of the first lot of lumber was before Harford acquired any title to the property, though work on the premises had actually begun, the lien of the mechanic would postdate a mortgage given for the purchase money; and of course the same result would follow if the mortgage were really prior in point of time: *Steininger v. Rueman*, 28 Mo. App. 594.

And it seems that a mechanic's lien, under the terms of section 6706, only attaches to the property in the condition in which it comes into the mortgagor's hands. If he purchase property and give a mortgage for the purchase money the deed which he receives and the mortgage which he gives constitute but one ¹⁷⁸ transaction, and the lien of the mortgage for the purchase money cannot be displaced or postponed by a mechanic's lien which attached simultaneously with the acquisition of title by the mortgagor: 1 Jones on Mortgages, sec. 158; *United States v. New Orleans R. R. Co.*, 12 Wall. 362; *Steininger v. Raeman*, 28 Mo. App. 594.

(b) But further on this point: "If a husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor or to a third person to secure the purchase money, either in whole or in part, such a transitory seisin by the husband, the instantaneous passage of the fee in and out of him, is not deemed enough to render him sufficiently and beneficially seised to entitle his wife to dower as against the mortgagee, though on foreclosure of the mortgage she will be entitled to such portion of the surplus proceeds of the sale after satisfying the mortgage as equals her claim to the extent of her dower: 4 Kent's Commentaries, 13th ed., *39. Now, if dower, the favored and favorite estate, both at law and in equity, cannot attach, in the circumstances stated, to the temporary seisin of the husband, certainly a like result should follow where a lien *in invitum*, one strictly statutory in its

nature and limited by the terms of the statute to the precise extent of the owner's title, is attempted to be established.

(c) In this case, as heretofore stated, the Interstate Lumber Company, after recovering a judgment establishing and foreclosing its lien against both the lots and the improvements, would not sell under the judgment thus obtained, but at a subsequent term caused that judgment to be altered, so as to establish the lien against the improvements only. This modification, however unwarranted it was, and contrary to all known rules of practice and procedure, must be treated as a tacit but substantial confession of record of the fact that ¹⁷⁹ the plaintiff company in that case was only entitled to a lien against the houses, and thereby confesses the priority of the mortgage lien under which plaintiff bought.

3. No valid judgment can be rendered establishing and foreclosing a mechanic's lien, unless the contractor is brought, or voluntarily appears, before the court as a party to the suit. This was not done in this case, because of lack of proper service on Harford, both the contractor and owner of the property: Rev. Stats. 1889, sec. 6713.

In *Wibbing v. Powers*, 25 Mo. 599, Judge Scott said: "The contractor is the only person who can contest the validity of the demand; and, as the proceeding was dismissed as to him, there was no person to defend the claim of the plaintiff. This case is as if a creditor, proceeding by attachment and garnishment, should dismiss his suit against the defendant—the debtor—and afterward take steps against the garnishee, when there could be no judgment which he could be condemned to satisfy": See, also, *Ashburn v. Ayres*, 28 Mo. 77; *Steinmann v. Strimple*, 29 Mo. App. 478; *Wescott v. Bridwell*, 40 Mo. 146.

Here the service on Harford was made in Kansas, professedly under the provisions of section 2029 of the Revised Statutes of 1889. But the return of the sheriff of that state is not sufficient under the provisions of the section of the statute just mentioned. That section requires that the affidavit of service should be made "before the clerk or judge of the court of which affiant is an officer." This clause is not to be found in the affidavit, and of course it is a nullity, and the return of service worthless; and, since the judgment against Harford was by default, the circuit court was without jurisdiction to render any judgment in the case. The invalidity of the return of an officer made outside of this state must accomplish

equally as detrimental results ¹⁹⁰ as within this state, and, when made within this state, it has been ruled in several cases that a judgment based thereon is null: *Brown v. Langlois*, 70 Mo. 226, and cases cited.

4. It has been urged that the plaintiff cannot attack collaterally the judgment rendered in the mechanic's lien suit. But there is no doubt that a stranger whose interests are about to be prejudiced by the enforcement of the judgment may show that it was rendered without jurisdiction: 2 Freeman on Judgments, 4th ed., sec. 337; 1 Freeman on Judgments, sec. 154. Besides, a judgment cannot bind the rights of a stranger: 1 Freeman on Judgments, sec. 154; 1 Black on Judgments, secs. 218-220.

5. Something has been said about the proceeding to enforce a mechanic's lien being one *in rem*, but this is incorrect. This is a proceeding *inter partes*, and so appears by the record itself: 2 Freeman on Judgments, sec. 606, and cases cited; *Dunphy v. Riddle*, 86 Ill. 22.

But, even if such were the nature of the proceeding, it would bind no one not made a party to it, and would not be even *prima facie* evidence against such non-notified person: *Hassall v. Wilcox*, 130 U. S. 493; *Windsor v. McVeigh*, 93 U. S. 274.

There are numerous other and fatal errors which might be noted in the proceeding which plaintiff was successful in enjoining, but it is quite unnecessary to do so.

Decree affirmed.

All concur.

MECHANICS' LIENS—FORECLOSURE—MORTGAGEE AS PARTY.—A mechanic's lien should be enforced by making all persons interested in the land parties to the suit, as the rights of those not made parties are not affected by the decree: *Williams v. Chapman*, 17 Ill. 423; 65 Am. Dec. 669, and note. A prior mortgagee is properly made a party to a proceeding to enforce a mechanic's lien under the Illinois statute, although the mortgage debt may not yet be due: *North Presbyterian Church v. Jevne*, 32 Ill. 214; 83 Am. Dec. 261, and note. A mortgagee need not be made a party to proceedings to enforce a mechanic's lien in order to cut off his right to redeem. The judgment is conclusive upon the parties, and those who claim under or through them: *State v. Eads*, 15 Iowa, 114; 83 Am. Dec. 399, and note.

MORTGAGES—MECHANICS' LIENS—PRIORITY.—The lien of a mortgage for the purchase price of land is paramount to any lien existing in favor of a mechanic for labor in erecting a building thereon: *Saunders v. Bennett*, 160 Mass. 48; 39 Am. St. Rep. 456, and note; but see *Hartun etc. Heater Co. v. Gordon*, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note, with the cases collected; also the note to *Kirkpatrick v. Kansas City etc. R. R. Co.*, 41 Am. St. Rep. 758.

JUDGMENTS BY DEFAULT ON IMPROPER SERVICE OF PROCESS.—Judgment by default when the proof of service of process is defective is void, and a motion to vacate it cannot be resisted by proving that the summons was in fact properly served: *Reinhart v. Lugo*, 86 Cal. 395; 21 Am. St. Rep. 52, and note. See, also, the note to *Williams v. Wescott*, 14 Am. St. Rep. 296.

NOLAND v. BARRETT.

[122 MISSOURI, 181.]

JUDICIAL SALES—ADMINISTRATOR'S SALE WITHOUT APPRAISEMENT—COLLATERAL ATTACK.—The sale of real estate by an executor or administrator without having it appraised is an irregularity for which the sale may be set aside in a direct proceeding for that purpose; but it is not on this account absolutely void in a collateral proceeding after confirmation by the probate court; nor is it void because appraisement was made before the entry of the order of sale.

JUDICIAL SALES.—ADMINISTRATOR'S SALES OF REAL ESTATE, under orders of the probate court, in those states which require such sales to be reported to the court for its approval or rejection, are judicial sales.

JUDICIAL SALES.—ADJOURNMENT BY AN ADMINISTRATOR of a sale of real estate to a time different from that fixed in the order of the probate court authorizing the sale does not render void the sale as afterward made, reported, and confirmed by such court, especially if the administrator has exercised a wise discretion in adjourning the sale for the purpose of preventing a sacrifice of the property.

JUDICIAL SALES—CONFIRMATION—CONCLUSIVENESS.—The judgment of the probate court confirming an adjourned sale of real estate made by an administrator is final and conclusive until set aside in a direct proceeding, and cannot be collaterally attacked.

H. C. McDougal and C. F. Moulton, for the appellants.

G. F. Ballingal and Botsford & Williams, for the respondents.

184 GANTT, P. J. This is an action of ejectment by the widow and heirs at law of William H. Twyman, late of Jackson county, against William T. Barrett, the tenant of Mrs. Catherine E. Donnell, and Mrs. Donnell, and her husband, for two hundred and three acres of land in Jackson county, to wit: East half of the southwest quarter and west half of southwest quarter, except fifty acres off of the north end of the last-mentioned tract, all in section 7, township 49, range 32 west; and all the land east of the Big Blue river in the east half of section 12 in township number 33, containing fifty acres; and the southwest quarter of section 7, township 49, range 32, and ten acres off the north side of the southwest quarter of section 7, township 49, range 32, con-

taining in all two hundred and three acres. The ouster was laid March 1, 1888.

The answer is a general denial, and a plea of the statute of limitations as to one hundred acres of the land, and an averment of title to all of the land in Mrs. Donnell. The verdict and judgment was for the defendants in the court below, and since this appeal the plaintiffs have abandoned in this court any claim to one hundred acres, being all the land east of the Big Blue river in section 12, township 49, range 33, and fifty acres off the north end of the west half of the southwest quarter of section 7, township 49, range 32. ¹⁸⁵ Mrs. Elizabeth Heald is the widow of William H. Twyman, deceased; said Twyman died in March, 1874, seised and possessed of all the lands sued for in fee simple; he left five children, plaintiffs in this case. The defendants admitted possession, and denied all other allegations.

The defendants, to maintain their defense, proved the following facts:

1. That soon after the death of William H. Twyman, deceased, and on March 25, 1874, one Jesse Noland was duly appointed as the administrator of his estate, and, as such, sold for the payment of debts, to said defendant Mack S. C. Donnell, on June 8, 1874, one hundred acres of said land, being the same one hundred acres described in the answer herein, and there claimed by defendant under the ten years' limitation.

2. That upon the acceptance of the resignation of said Noland as such administrator, and on November 16, 1878, Milton Moore, then public administrator of Jackson county, was ordered to, and did, take charge of said estate, as the administrator *de bonis non* thereof.

3. That on August 11, 1880, said Milton Moore, as such administrator *de bonis non*, filed in the probate court his petition "for the sale of the whole of the real estate and of the personal estate with its appraised value," and that an order of publication was then duly entered thereupon.

4. That at the next term, and on November 13, 1880, upon proof of publication, said probate court ordered a sale of said real estate "at public or private sale," and if the former, then the court "further orders that said administrator give notice of the time, terms, and place of sale as by law required," etc.

5. That under the order of sale made at said ¹⁸⁶ Novem-

ber term, 1880, the administrator, Milton Moore, advertised the one hundred and three acres of land, remaining in dispute in this case, for sale at public auction, on February 14, 1881, and on that day he appeared at the courthouse in Independence to make said sale, and offered said property for sale under the terms of said order, but, to use the language of his report of sale, "a snowstorm of unprecedented violence had been prevailing throughout the country, rendering many of the public roads almost impassable, and it was represented to him that, owing to the inclemency of the weather and the state of the roads, many persons who desired to bid for said property could not be present, among the number the widow of the deceased, and, deeming it for the best interests of the creditors of the estate and for the estate itself, he adjourned said sale until Saturday, the nineteenth day of February, 1881, then to be made in pursuance of said order, notice, and adjournment, and then continued said sale to the 19th of February, 1881, and again exposed said property to the highest and best bidder, and at said sale John McMahon, Esq., was the best bidder, for twelve hundred dollars, and it was sold to him for that sum." This report was duly verified, and was accompanied by the appraisement made August 9, 1880, and was duly approved by an order of record by the probate court of Jackson county.

On May 14, 1881, said administrator made his administrator's deed to said McMahon, in which said appraisement is recited as made on August 9, 1880, and that "said sale was adjourned from February 14th to February 19th, owing to the inclemency of the weather, and impassable condition of the roads, and want of bidders."

It was shown *aliunde* the report and deed, that on Saturday, Mrs. Twyman, Mr. Hale, her father, and ¹⁸⁷ Mr. Hale, her brother, were present, and bid at the sale, and many other bidders, and that it sold for its fair value at that time. It was also shown that the administrator received all of the twelve hundred dollars; that it was applied in part to the debts, and the balance of eight hundred and twenty-four dollars was distributed by the administrator to the heirs, the plaintiffs herein; that McMahon conveyed to Mrs. Donnell in 1881, and she and her husband and their tenants have ever since been in possession thereof, and have paid all the taxes thereon.

Plaintiffs seek to recover on two grounds: They maintain

the sale by the administrator, Moore, and his deed are void. 1. Because the appraisement was made before and not after the order of sale; 2. The sale was void, because the administrator adjourned and continued it from February 14 to February 19, 1881.

1. The statute in force when this sale was made was the same as our present statute, and required that "before any executor or administrator shall sell any real estate or any interest therein, by order of the court, he shall have it appraised by three disinterested householders of the county in which the land lies": Rev. Stats. 1879, sec. 162; Rev. Stats. 1889, sec. 161. The obvious purpose of this provision was to advise the probate court of the value of the estate, and assist it in exercising its judicial discretion in approving or disapproving the sale, and also to furnish *prima facie* evidence of value and the good faith of the administrator or executor and the purchaser.

The sale of the real estate by an executor or administrator without having it appraised is an irregularity for which the sale may be set aside in a direct proceeding for that purpose, but it is not on this account absolutely void in a collateral proceeding after confirmation by the probate court: 2 Wœrner's American Law of Administration, ¹⁸⁸ sec. 476; *Bell v. Green*, 38 Ark. 78; *Apel v. Kelsey*, 47 Ark. 413; *Neligh v. Keene*, 16 Neb. 407.

If a sale is not to be treated as wholly void in a collateral proceeding where no appraisement at all is had, *a fortiori* a sale is not to be held void when a perfectly fair appraisement, contemporaneous with the filing of the petition for sale, is made, but before the order of the sale. The statute commands an appraisement, but it is silent when that appraisement shall be made. This appraisement was made two days before the petition for sale was filed. In this manner not only was the court furnished with a guide for its approval or disapproval, but it was enabled in the first instance to determine how much and what part of the estate should be sold. While it is believed the general practice in this state has been to cause an appraisement to be made after the order of sale, we are not prepared to declare that an appraisement made at the time of filing the petition would be irregular, but we have no hesitancy in saying it will not render the sale void. Clearly not, after its approval by the probate court, under whose orders and direction it was done. Irregularities in the ap-

praisement have not heretofore been considered by this court sufficient to invalidate the sale of an administrator or curator: *Moore v. Wingate*, 53 Mo. 398; *Johnson v. Beazley*, 65 Mo. 250; 27 Am. Rep. 276; *McVey v. McVey*, 51 Mo. 406; *Bobb v. Barnum*, 59 Mo. 394.

But, even if the appraisement be conceded to be irregular, the subsequent confirmation of the report, in which that appraisement was specifically called to the attention of the probate court and of all parties interested in said lands, cured the irregularity. The order of approval was a final judgment from which an appeal could have been taken, and was the judgment of a court having jurisdiction of the cause and over the parties, and is entitled in this collateral proceeding to the same ¹⁸⁹ favorable presumptions and intendments that are accorded to the judgments of circuit courts, and no more open to collateral attack: *McVey v. McVey*, 51 Mo. 406; *Camden v. Plain*, 91 Mo. 117; *Price v. Springfield Real Estate Assn.*, 101 Mo. 107; 20 Am. St. Rep. 595; *Lingo v. Burford*, 112 Mo. 149.

2. The remaining proposition is that the adjournment of the sale from Monday, the fourteenth day of February, 1881, to Saturday, the nineteenth day of February, 1881, rendered the sale void, notwithstanding an unprecedented snowstorm had so blocked up the roads that the widow and others desiring to bid could not reach the courthouse, and this was known to the administrator, and the adjournment secured their presence on Saturday, and the land brought a fair price.

An administrator's sale of real estate, under the orders of a probate court, in those states which require such sales to be reported to the court for its approval or rejection is a judicial sale: *Halleck v. Guy*, 9 Cal. 181; 70 Am. Dec. 643; *Mason v. Osgood*, 64 N. C. 467; *Vandever v. Baker*, 13 Pa. St. 121; *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735; *Worthington v. McRoberts*, 9 Ala. 297; *Grignon v. Astor*, 2 How. 319. The law requiring such sales to receive the approbation of the court before it shall be binding or valid to pass the title, in effect makes the sale the act of the court; hence the propriety of denominating such sales "judicial sales."

In this state it has been common to denominate sheriff's sales, whether under execution or decrees in partition, as judicial: *Seymour v. Farrell*, 51 Mo. 95; *Hewitt v. Weatherby*, 57 Mo. 276. But in most of the courts of last resort, and by the most discriminating text-writers, the distinction has been

consistently maintained between judicial sales and execution sales in those states in which execution sales are not required to be reported to the courts for approval. The sheriff sells by the naked authority of the writ, and he must ¹⁹⁰ conform to the law, else his sale will be irregular or void according to the materiality of his departure from the requirements of the statute. If his sale is not void the title passes at once, by his deed, without the approval of the court, whereas, if the sale is a technical judicial sale, as it is now understood, that is to say, a sale under a decree or order of the court, and which must be reported to the court for its approval, no title passes until it is approved: *State v. Towl*, 48 Mo. 148; *Valle v. Fleming*, 29 Mo. 152; 77 Am. Dec. 557; *Evans v. Snyder*, 64 Mo. 516; *Snider v. Coleman*, 72 Mo. 568; *Henry v. McKerlie*, 78 Mo. 416; Rorer on Judicial Sales, sec. 43.

While execution sales have sometimes been denominated judicial sales by this court it does not follow that the distinction drawn by other courts between administrator's and other judicial sales and execution sales does not obtain in this court also. By our laws and decisions an administrator's sale has no binding effect until approved by the probate court, thus bringing it strictly within the principle of those cases which hold such sales are judicial as contradistinguished from execution sales, which are ministerial.

The courts of this state have always endeavored to sustain sales made by ministerial officers under executions on judgments. The welfare of the community demanded that they should, for in this way property brought fair prices, and was not liable to sacrifice. But such sales are the acts of a ministerial officer, whose authority is derived from and is regulated by the law itself, and he is not required to call upon the court for approval of his acts. When the court renders judgment and awards execution its function is ended. It does not direct the sheriff on what property to levy or how to make his sale. The law in such ¹⁹¹ cases is his guide. If he is guilty of an irregularity the court is not responsible for it.

In a judicial sale he acts as the agent or instrument of the court to sell a particular piece of property. He is bound to report his proceedings to the court, and, if the court approves his acts, it adopts them as its own, and it becomes a judicial act, and, if the court has jurisdiction, its decision is not open to collateral attack.

We have been led into this discussion because the plaintiffs rely upon the case of *Ladd v. Shippe*, 57 Mo. 523, in which a sheriff postponed a sheriff's sale of real estate on the day for which it was advertised to the succeeding day, and this fact appearing on the face of the deed, it was held void, because the officer had no power to adjourn the sale.

The statute of 1835 required that "all property taken in execution by any officer shall be exposed to sale on the day for which it is advertised, between the hours of 9 in the forenoon and 5 of the afternoon, publicly, by auction, for ready money, and the highest bidder shall be the purchaser." Judge Vories says: "It does not appear at whose motion the sale was postponed by the court, or that either party was present consenting thereto; nor does it appear at what particular time the proclamation was made at the courthouse door. It seems to me that it would be a very dangerous precedent to hold that a sale might be postponed in this way; it would open the door for abuse."

So that, while it may be true that a ministerial officer, acting under the statute, may be restricted to the methods prescribed by the statute, it becomes necessary to inquire whether an adjournment of a sale made under a decree in chancery, or the order of a ¹⁸³⁵ probate court, will render it void, if subsequently reported to and approved by the court.

In *Blossom v. Railroad Co.*, 3 Wall. 196, under a foreclosure decree, the marshal advertised the railroad for sale on June 6, 1862, but as no bids were received that day he adjourned the sale to the 19th of that month. He again offered it for sale and Blossom bid two hundred and fifty thousand dollars, which was the best bid at the time, but the agent of the stockholders requested the solicitors of complainant to postpone the sale to another day, and they agreed, and the marshal again continued the sale for two days, and announced that appellant's bid would be regarded as pending. An arrangement was then made to prevent the sale altogether. Blossom, having increased his bid to the full amount of the debt, then applied to the court to have the sale confirmed to him, but the court denied his prayer. His contention in the supreme court was that, inasmuch as his bid was the highest, it was the duty of the marshal to strike it off to him, and he had no right to postpone the sale.

Upon this state of facts the supreme court of the United States said: "Every such officer has a right to exercise a

reasonable discretion to adjourn such a sale, and all that can be required of him is, that he should have proper qualifications, use due diligence in ascertaining the circumstances, and act in good faith, and with an honest intention to perform his duty. The general rule is, that a sheriff is not bound to obey the directions of the attorney of the creditor to make an unreasonable sale of the property of the debtor, if he sees that the time selected, or other attending circumstances, will be likely to produce great sacrifice of the property; but he may in such a case, if he thinks proper, postpone the sale, especially if it appears that the creditor will not sustain any considerable injury by the delay; and no ¹⁹³ reason is perceived why the same rule may not be safely applied in judicial sales made under the decretal order of a court of chancery. . . . The marshal or master, in carrying out a decretal order, is more than an auctioneer. They have duties to perform for all concerned, and in the performance of those duties they may adjourn the sale for good cause shown."

The difference between an administrator acting under an order of court and a marshal or master in chancery under the decree of a court of equity is merely one of mode, and in nowise affects the principle involved. In either case the officer making the sale occupies a position of trust.

In *Richard v. Holmes*, 18 How. 143-147, the supreme court of the United States, discussing the duty of a trustee to postpone a sale in foreclosing under a deed of trust, said: "If he has not this power the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf under the circumstances supposed, and which he may well be presumed to intend to confer on another. This power of sale does not undertake to prescribe the particular manner of making the sale. It is to be at public auction, and 'after having given public notice of such sale by advertisement at least thirty days,' but it assumes that the sale will be conducted as such sales are usually conducted. A sale regularly adjourned, so as to give notice to all persons present of the time and place to which it is adjourned, is, when made, in effect the sale of which previous public notice was given."

Other courts have held that a public officer, upon whom a power of sale is conferred by law, may adjourn an advertised

public sale to a different time and ¹⁹⁴ place to obtain a better price: *Tinkom v. Purdy*, 5 Johns. 345; *Russell v. Richards*, 11 Me. 371; 26 Am. Dec. 532; *Lantz v. Worthington*, 4 Pa. St. 153; 45 Am. Dec. 682; *Warren v. Leland*, 9 Mass. 265; *Collier v. Whipple*, 13 Wend. 229; *Dexter v. Shepard*, 117 Mass. 485; *Allen v. Cole*, 9 N. J. Eq. 286; 59 Am. Dec. 416; *Coxe v. Halsted*, 2 N. J. Eq. 311; *Miller v. Law*, 10 Rich. Eq. 320; 73 Am. Dec. 92.

So that a master in chancery under a decree, and an administrator or executor under an order of sale, may postpone a sale when it would otherwise result in injury to the estate or creditors, nor do we perceive the great danger in permitting such a course, seeing that it must be reported for approval. Until the court approves, no title, legal or equitable, can pass, and it is open to the objections of all interested parties; but when the probate court, having once acquired jurisdiction, approves the sale, all these questions are concluded by its judgment in all collateral actions: 2 Wœrner's American Law of Administration, sec. 478; authorities, *supra*.

The approval of the report in this case, which stated the postponement and the exigency therefor, was a judgment by the probate court that in its opinion the administrator exercised a wise discretion in adjourning said sale, and that judgment is final and conclusive until impeached and set aside in a direct proceeding. It results that the judgment of the circuit court must be, and is, affirmed.

All of this division concur.

JUDICIAL SALES—WHETHER SALES BY EXECUTORS OR ADMINISTRATORS ARE.—A sale of land by an executor or administrator is a judicial sale: *Lynch v. Baxter*, 4 Tex. 431; 51 Am. Dec. 735, and note; *Suckett v. Twining*, 18 Pa. St. 199; 57 Am. Dec. 599, and note; *Halleck v. Guy*, 9 Cal. 181; 70 Am. Dec. 643, and note, with the cases collected. In *McGuinness v. Whalen*, 16 R. I. 558; 27 Am. St. Rep. 763, it was held that under the Rhode Island statutes such sales were not judicial sales.

JUDICIAL SALES—ADJOURNMENT.—A sale may be adjourned by the sheriff, public officer, or trustee appointed to make it without giving further notice: *Hosmer v. Sargent*, 8 Allen, 97; 85 Am. Dec. 683, and note; but in *Tippett v. Mize*, 30 Tex. 361, 94 Am. Dec. 313, it was held that sales by an administrator must be made in the prescribed manner, and, if made at a place and time other than that prescribed by the statute or decree, they are not only irregular, but void. The subject of the adjournment of judicial sales is discussed at length in the extended note to *Russell v. Richards*, 26 Am. Dec. 536.

JUDICIAL SALES.—EFFECT AND CONCLUSIVENESS OF ORDER CONFIRMING: See the extended note to *Watson v. Tromble*, 29 Am. St. Rep. 495. An

order of the probate court confirming an executor's sale must be treated as final and conclusive until reversed or vacated (*Bland v. Muncaster*, 24 Miss. 62; 57 Am. Dec. 162), and will not be inquired into collaterally: *Sackett v. Twining*, 18 Pa. St. 599; 57 Am. Dec. 599, and note; *Richardson v. Butler*, 82 Cal. 174; 16 Am. St. Rep. 101, and note. In *Townsend v. Tallant*, 33 Cal. 45; 91 Am. Dec. 617, it was held that a void administrator's sale could be attacked collaterally, although confirmed by the probate court.

RUSSELL v. RUSSELL.

[122 MISSOURI, 235.]

PARTITION.—ESTATES BY ENTIRETY ARE DISSOLVED BY DIVORCE; they then become tenancies in common, and may be partitioned.

I. C. Duckworth, for the appellants.

I. H. Lucas, for the respondent.

236 SHERWOOD, J. The question presented by this appeal is whether a wife divorced from her husband can have partition of land owned by them prior to such divorce as tenants by the entirety. Such tenancies were recognized at an early day in this state (*Gibson v. Zimmerman*, 12 Mo. 385); at a time, too, **237** when our statute was in this form: "Every interest in real estate granted or devised to two or more persons, other than executors or trustees, as such, shall be a tenancy in common, unless expressly declared, in such grant or devise, to be in joint tenancy." The statute had been in this form since 1835, and substantially in that form ever since 1825. Thus the statute remained until 1865, when it was amended by striking out the words "as such" and inserting immediately after them "or to husband and wife": Gen. Stats. 1865, sec. 12, p. 443.

This rule of the common law seems to have been intentionally emphasized in the amended statute just quoted, is a settled rule of property of this state, and the section still retains a place in the last revision: 2 Rev. Stats. 1889, sec. 8844; *Garner v. Jones*, 52 Mo. 68; *Shroyer v. Nickell*, 55 Mo. 264; *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302. In which last case, after a considerable citation and discussion of authorities, it was ruled that the interest of a husband in land by entirety could be sold under execution, but that his wife, surviving him, would take the entire estate.

The peculiarities of this sort of tenancy are derived from

the fact that in legal contemplation husband and wife are a unit of personality; there can be no moieties between them; they are each seised of the entirety *per tout*, not *per my* and the husband cannot forfeit or alien the estate, except during the period of his life: *Hall v. Stephens*, 65 Mo. 670; 27 Am. Rep. 302, and cases cited. And, owing to this legal unity of husband and wife, it is said to be impossible, even by express words, to convey land to them so as to make them tenants in common with each other: *Dias v. Glover*, 1 Hoff. Ch. 71; *Stuckey v. Keefe*, 26 Pa. St. 397, and cases cited.

This being the case, the question arises, What ²³⁸ effect, if any, does a decree of divorce have upon the *status* of an estate by entirety? On this point Freeman observes: "At the present day, partition of property held in entireties may be obtained in connection with a decree of divorce, or whenever, by a divorce, the legal unity of the cotenants has been destroyed. In other words, while the tenancy by entireties continues, no partition can be made; but when the tenancy has been converted into a tenancy in common, by the destruction of its peculiar and essential unity—namely, unity of person—it may, like other tenancies in common, be partitioned": Freeman on Cotenancy and Partition, 2d ed., sec. 444.

Bishop, when speaking of the same topic, says: "But all agree that this tenancy does not and cannot exist where there is no marriage. The consequence is that, when the marriage ends by divorce, it falls In most of our states there are statutes, contrary to the common law, whereby two persons seised of an estate become presumptively, or, in the absence of special words, tenants in common. Therefore, it has been held, and the author believes justly, that the effect of a divorce where this legislation prevails is to render the parties tenants in common of what before they held by the entirety": 2 Bishop on Marriage, Divorce, and Separation, secs. 1650, 1651. This is the prevalent view: *Harrer v. Wallner*, 80 Ill. 197; *Hopson v. Fowlkes*, 92 Tenn. 697; 36 Am. St. Rep. 120; 1 Washburn on Real Property, 5th ed., 708; 17 Am. & Eng. Ency. of Law, 692, 693; *Kirkwood v. Domnau*, 80 Tex. 645; 26 Am. St. Rep. 770; *Enyeart v. Kepler*, 118 Ind. 36; 10 Am. St. Rep. 94.

The result of the reasoning and teaching of the foregoing authorities is to this effect: That, as a legal unity of husband and wife was the only basis of the estate by the entirety,

the destruction of that unity by divorce necessarily makes the tenants by the entirety ²³⁹ tenants in common; that the barrier of unity thus being removed, partition could be had between such tenants in common with the same facility and results as between other like tenants, and this upon the principle of the maxim, "*Cessante ratione cessat ipsa lex.*" The lower court took the same view of the matter, and ordered partition to be made, and we affirm the judgment.

All concur.

ENTIRETIES—EFFECT OF DIVORCE ON THE ESTATE.—A tenancy by the entirety, on the divorce of the husband and wife is destroyed, and the property which was subject thereto vests in them as tenants in common: *Hopson v. Fowlkes*, 92 Tenn. 697; 36 Am. St. Rep. 120, and note, with the cases collected.

CALLAHAN v. INGRAM.

[122 MISSOURI, 355.]

SLANDER—PRIVILEGE—DISCUSSION OF OFFICIAL CONDUCT.—A member of a city council, during a session thereof, is not privileged to falsely call another city officer a "thief," although the term is intended to apply to his official conduct, if there is no inquiry pending or proposed as to such conduct.

SLANDER—PRIVILEGE—QUESTION OF LAW.—In an action of slander the question whether the occasion on which the words were spoken was such as to make the communication one of privilege is always a question of law for the court, when there is no dispute as to the circumstances under which it was made.

SLANDER—INNUENDO.—The office of an innuendo in a declaration for slander is to set a meaning upon words or language of doubtful or ambiguous import; and which, if taken alone, are not actionable. In case the defamatory meaning is apparent from the words used no innuendo is necessary.

SLANDER—INNUENDO.—If the words alleged as slanderous are actionable *per se* an innuendo limiting their meaning may be disregarded.

SLANDER—INNUENDO, WHEN DISREGARDED.—A declaration falsely made that a person is a "downright thief" is slanderous and actionable *per se*, and, if alleged with an innuendo, is ground for recovery of damages, without proof that the words were spoken in the sense alleged in the innuendo.

SLANDER—IMPLIED MALICE.—EXEMPLARY DAMAGES may be recovered in an action for slander when defamatory words are spoken with implied malice, as well as when they are spoken with express malice, and malice is implied from the willful utterance of falsehoods concerning another, whereby injury is done to his character.

SLANDER—EXEMPLARY DAMAGES—QUESTION FOR JURY.—Exemplary damages may always be given in actions for slander when the defamatory words are maliciously spoken, but whether such damages should be

given in any case is a matter within the discretion of the jury. If the defendant has put in evidence circumstances tending to rebut malice, exemplary damages can only be awarded in case the jury is satisfied that the words were maliciously spoken, and the jury should be so instructed.

SLANDER—DAMAGES—EVIDENCE IN MITIGATION.—Evidence of the intention and motive of the defendant in slander in speaking the defamatory words is admissible in evidence for the purpose of mitigating the punishment, by way of exemplary damages, but not for the purpose of mitigating the actual damages.

SLANDER — MALICE — EVIDENCE. — In an action for slander statements by others than the defendant about the matter respecting which the slanderous words were spoken are admissible in evidence to show want of actual malice.

SLANDER—EVIDENCE.—In an action for slander a person who heard the defamatory words uttered cannot testify as to his understanding of their meaning.

Thompson & Wilcox, for the appellant:

H. Bell and W. Adams, for the respondent.

360 **MACFARLANE, J.** Action for slander. The petition charged that on the 4th of November, 1889, plaintiff was appointed superintendent of streets of Kansas City, which was an office of honor and trust, under the charter and ordinances of said city. That on said date, at a meeting of the common council of said city, in the presence of divers persons, naming other members of said council, and the clerk thereof, and other persons then present, defendant "falsely and maliciously spoke and published of and concerning the plaintiff the false and malicious words following, to wit: 'Now, I want to say something, and I want the reporters to get it. The superintendent of streets, this Callahan, is a downright thief, and I can prove it.'"

The petition further charged that, at the time the words were spoken, there was not then pending before said council any ordinance, motion, resolution, or report referring to plaintiff or the office so held by him. "That defendant meant and intended by the use of said words so spoken and published by defendant as aforesaid to charge plaintiff with being guilty of willful, corrupt, and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity as such superintendent of streets or under color of his said office. Plaintiff further states that, at the time said words were so spoken by defendant, the defendant well knew the same to be false, and said words were so spoken by defendant wantonly and maliciously, and with the intention of injuring

plaintiff"; that the words spoken ³⁶¹ were false, and plaintiff was "greatly injured in said office and in his feelings, good name, and reputation."

The answer was a general denial and a special plea, as follows:

"For a second and further answer to plaintiff's amended petition defendant says that, at the time the supposed defamatory words were spoken by defendant, the lower house of the common council of Kansas City, being regularly in session, were discussing the office of superintendent of streets, and the actions and methods of Superintendent Callahan, the plaintiff. It had been stated by different members of the council that he was an inefficient and incompetent officer, and had been guilty of misconduct, oppression, partiality, and abuse of authority, in his official capacity. During this discussion the defendant, in the discharge of his duty as a member of said common council in discussing the official conduct of plaintiff, stated that the resolution previously introduced by him to investigate the city officials was aimed at Superintendent Callahan; that said Callahan, in his official position as inspector of curbing, had condemned curbing that was being put in by one party, and permitted another man, a favorite of said superintendent, to put in the same stone, entailing loss on the first man, and bestowing official favors on the second; that he had also given acceptances for curbing put in by one man to another, knowing at the time he gave the acceptances that the person to whom he gave them had not done the work, and was not entitled to them, thus enabling the second man to collect pay for work done by the first, and defrauding one man, to put money into the pocket of a favorite of said Callahan.

"Defendant, in stigmatizing such conduct as dishonorable and dishonest, applied the term 'downright thief' to said superintendent. Defendant says that this ³⁶² statement was made in the discharge of his official duty as above set forth, and without malice or ill-will to plaintiff, and that he had good reason to believe, and did believe, that the statements he made were true, and that the opprobrious epithet he used was a just and fair characterization of such official misconduct.

"Defendant further states that the circumstances above referred to are as follows: In June, 1887, John Henry had a private contract to put in about eighty-two feet of curbing for F. J. Baird on Twentieth street, between Southwest Boulevard and

Broadway; that said Henry did said work and put in said curbing, and said Callahan, though knowing that said Henry had done said work, issued acceptances to one Bashford; that in the fall of 1887 Johnson and Thompkins were putting in curbing on Sixteenth street, between Penn and Broadway, and that they got the curbing of Richard Cummins; that said Callahan condemned some of said stone, and said Cummins sold it to one Bashford, and Callahan allowed him to use it for curbing on another street." The reply was a general denial.

The evidence showed that plaintiff was, on the fourth day of November, 1889, superintendent of streets, and defendant was a member of the city council; that defendant had previously held the office of inspector of curbing and sidewalk construction; that some time previously defendant had introduced in the lower house of the council, of which he was a member, a resolution, bearing on plaintiff's official conduct, which had passed that house and gone to the upper house, where it then remained undisposed of. On this occasion a member raised a question of privilege, and a general discussion and criticism of plaintiff's official conduct followed, in which defendant spoke the words attributed to him, making special reference in what he said to the alleged misconduct set up in his special plea. ³⁶² At the time no resolution, ordinance, motion, or report was before that house respecting plaintiff or his official conduct.

On the trial defendant offered to prove that those present who heard defendant's language understood it to refer to official misconduct of plaintiff in the matters referred to. He also offered to prove the reasons and motives which induced him to speak of plaintiff as he did. These offers were refused by the court.

Defendant, in support of his special plea, undertook to prove that, while plaintiff was inspector of curbing, he issued to one party a certificate for curbing put in by another. Under the ordinances the engineer was required, after completion of work, by the owner of the property charged therewith, to grant a certificate of the fact, which, when filed, exonerated the owner from liability to pay for the improvement. Defendant offered in evidence a certificate of that character, which showed that the measurement had been made by plaintiff as inspector, but without designating who

had done the work. The court refused to permit this certificate to be read in evidence.

At request of plaintiff the court gave the jury the following instructions:

"1. The jury are instructed that, if they believe from the evidence that on November 4, 1889, the plaintiff, acting as superintendent of streets of Kansas City, and that defendant Ingram was a member of the common council of Kansas City, and at a meeting of the lower house of the common council, and in the presence of various people, the defendant maliciously used the following language of and concerning the plaintiff in his character of superintendent of streets, namely: 'Now, I want to say something, and I want the reporters to get it. The superintendent of streets, this Callahan, is a downright thief, and I can prove ³⁶⁴ it.' And, if the jury further believe that said language was false and untrue, then the said jury should find for the plaintiff.

"2. Malice does not consist alone in personal spite or ill-will, but it exists in law wherever a wrongful act is intentionally done without just cause or excuse.

"3. The court-instructs the jury that the defendant is not protected in this action from liability for the words used by him against plaintiff by reason of having uttered them in the chamber of the lower house of the common council of Kansas City.

"4. The jury are instructed that, in making their verdict, they may take into consideration all the facts and circumstances as detailed by the witnesses, and if the jury find for plaintiff in estimating the damages, which they may think plaintiff has sustained, the jury may take into consideration and allow the plaintiff, for the mortification to his feelings, suffered from the act of defendant complained of, and may add thereto as punitive damages such amount as will adequately punish the defendant for such act, and serve as a warning to prevent others from being guilty of a like act."

The court gave one instruction for the defendant as follows:

"11. The jury are instructed that if they believe from the evidence that the remarks of defendant at the council meeting on the 4th of November, 1889, in reference to plaintiff, taken as a whole in their import, referred to him as inspector of curbing and not as superintendent of streets, then your verdict should be for the defendant."

The judgment was for plaintiff for five thousand dollars, and defendant appealed.

1. Defendant admitted speaking the words imputed to him, but undertook to justify what he said on the ground that he was at the time a member of the city ³⁶⁵ council of Kansas City, which was in regular session, and had under discussion the office of superintendent of streets and the official action and methods of plaintiff, who was then such superintendent; that in the discharge of his official duty he had the right and privilege to discuss and characterize the official misconduct of plaintiff.

There can be no doubt, on proper occasion, members of the city council would be protected from "responsibility for whatever is said by them which is pertinent to any inquiry or investigation pending or proposed before them," but no further; they would become "accountable when they wander from the subject in hand to assail others": Cooley on Torts, 2d ed., *214; *Neeb v. Hope*, 111 Pa. St. 152.

Members of the city council, in particular, and all citizens in general, are interested in the proper, honest, and efficient administration of the public service, and have the right, in the public interest, to criticise public officers, and to prefer charges for malfeasance or neglect of duty, if done in good faith, upon probable and reasonable grounds, but the law does not permit any person to slander another, on any occasion, or under any circumstances, when they are not protected by absolute privilege.

It is charged in the petition, and conclusively shown by the evidence, that, when the objectionable words were spoken, there was no inquiry pending or proposed before that house of the council which would make the occasion one of privilege, beyond that which is accorded to every citizen. Defendant was not privileged to falsely characterize the plaintiff as a "thief," though the term was intended to apply to his official conduct.

Whether the occasion is such as to make the communication one of privilege is always a question of law ³⁶⁶ for the court where there is no dispute as to the circumstances under which it was made, and the court did not err in holding that the language applied to defendant was not privileged: Newell on Defamation, Slander, and Libel, sec. 9, p. 391; Odgers on Libel and Slander, 183; 13 Am. & Eng. Ency. of Law, 406. The words spoken were actionable in

themselves, and, being admitted by the answer, the court properly instructed the jury that, if they were false, the defendant was liable.

2. Complaint is made of the first instruction given for plaintiff in that it is an abandonment of the meaning plaintiff, in his petition by innuendo, placed upon the words spoken. The innuendo charges that defendant intended and meant by the language used to charge plaintiff with oppression and partiality in the discharge of his official duties as superintendent of streets, and the claim is that he should be held to the interpretation he himself placed upon them, while the instruction authorized a recovery on proof of the falsity of the words admittedly spoken.

The innuendo is intended to define the defamatory meaning which the plaintiff places upon the words used. In case the defamatory meaning is apparent from the language charged there is no necessity for an innuendo at all. The purpose of the innuendo, and its effect upon the party pleading it, is thus expressed by Townshend in his work on Slander and Libel, section 338: "Where language is ambiguous and is as susceptible of a harmless as of an injurious meaning, it is the function of an innuendo to point out the meaning which the plaintiff claims to be the true meaning, and the meaning upon which he relies to sustain his action. This applies, whether the ambiguity be patent or latent, and whether or not there are any facts alleged as inducement. By this means the defendant is informed of the ²⁶⁷ precise charge he has to meet, and to deny or justify; but the plaintiff is subjected to the risk that if he claims for the language a meaning which is not the true one, or one which he is unable to make out satisfactorily, he may be defeated on the ground of variance or failure of proof. For, when the plaintiff, by his innuendo, puts a meaning on the language published, he is bound by it, although that course may destroy his right to maintain the action": To the same effect see Starkie on Slander and Libel, Folkard's ed., sec. 446; Newell on Defamation, Slander, and Libel, sec. 39, p. 629; Odgers on Libel and Slander, 100.

It will be seen that the office of the innuendo is to set a meaning upon words or language which are of doubtful or ambiguous import, and taken alone are not actionable, and it follows that in case the defamatory meaning is apparent from the words used an innuendo is unnecessary. Its use is

only necessary in order to bring out the latent injurious meaning of the words employed. When used for this legitimate and necessary purpose the plaintiff will be bound to abide by his own construction of the words used. The innuendo thus becomes a part of the cause of action stated.

The rule, as given by all the text-writers, is different when the words charged are actionable in themselves. In such case the defendant can put in issue the truth of the words spoken, either with or without the alleged meaning. "It will then be for the jury to say from the proofs whether the plaintiff's innuendo is sustained. If not, the plaintiff may fall back upon the words themselves, and urge that, taken in their natural and obvious signification, they are actionable in themselves without the alleged meaning, and that, therefore, his unproved innuendo may be rejected as surplusage": Newell on Defamation, Slander, and Libel, sec. 38, p. 628; Odgers on Libel and Slander, 101, and cases ³⁶⁸ cited. "An innuendo will not vitiate the proceedings, though new matter be introduced; and where the matter is superfluous, and the cause of action is complete without it, the innuendo may be rejected": Starkie on Slander and Libel, Folkard's ed., sec. 447; *Gage v. Shelton*, 3 Rich. 242. "If a complaint is sufficient without the innuendo, the innuendo may be rejected as surplusage; the innuendo may always be rejected when it merely introduces matter not necessary to support the action": Townshend on Slander and Libel, sec. 344, and cases cited; 13 Am. & Eng. Ency. of Law, 468.

The principle announced by these authors is supported by numerous cases cited by them, a case from this court being one. In that case defendant charged plaintiff with being a whore, meaning thereby that plaintiff "had been guilty of the crime of adultery." The proof disclosed that plaintiff was an unmarried woman. Upon an appeal from a judgment in favor of plaintiff, defendant insisted that, as plaintiff, by innuendo, had declared that defendant's wife intended by speaking the words to impute adultery, plaintiff was bound to prove they were uttered in the sense thus ascribed to them, but the court held that the innuendo could be rejected, and sustained the judgment: *Hudson v. Garner*, 22 Mo. 424.

There can be no doubt that the words "downright thief," applied to plaintiff, imputed to him the crime of larceny, and were in themselves actionable. The innuendo charging that defendant meant thereby to charge plaintiff with official

corruption, oppression, and partiality, also imputed a crime, and was actionable: Rev. Stats. 1889, secs. 3732, 3733. Defendant by answer admitted that he applied to defendant the term "downright thief" as charged. Upon this state of the pleading we do not think there was error in instructing the ³⁶⁹ jury that plaintiff could recover if defendant spoke the words as charged, and they were false, unless plaintiff was justified in so speaking.

3. The first instruction required the jury, in order to find for plaintiff, to also find that the defamatory words were spoken with malice. The second instruction told the jury that malice existed in law "whenever a wrongful act is intentionally done without just cause or excuse." The fifth instruction authorized the jury in making their verdict to add thereto, as punitive damages, "such amount as will adequately punish the defendant for such act, and serve as a warning to prevent others from being guilty of a like act." Exemplary damages were thus authorized without proof of express malice. Defendant insists that punitive damages in suits for slander are only recoverable when the wrongdoer was actuated by actual or express malice as distinguished from malice implied by law.

No one is excused for the libel or slander of another for the reason that the wrongdoer was without malice. The actual injury suffered does not depend upon the motive of the wrongdoer. The object, then, in giving evidence in proof of malice is to increase the damages beyond what was actually sustained: Odgers on Libel and Slander, 269; Townshend on Slander and Libel, sec. 91; 3 Sutherland on Damages, sec. 1205, and cases cited.

In slander the words are always intentionally spoken, whatever meaning may be imputed to them. Hence it is said: "When slanderous words are spoken, or a libelous article is published falsely, the law will affix malice to them. There is no necessity of proving express malice": *Buckley v. Knapp*, 48 Mo. 161. So it is uniformly held that when the words spoken are actionable in themselves, and are proved to be false, the law will ³⁷⁰ imply malice: *Hall v. Adkins*, 59 Mo. 144; *Price v. Whitely*, 50 Mo. 439; *Noeninger v. Vogt*, 88 Mo. 589; *Mitchell v. Bradstreet Co.*, 116 Mo. 226; 38 Am. St. Rep. 592. So it will appear that malice, such as the law implies, is the very gist of the action for slander. It is held, in some of the cases last cited, that when the words spoken

are actionable in themselves, the person injured will be entitled to recover without alleging or proving special damages. It is also held that a repetition of the defamatory words may be given in evidence for the purpose of proving express malice (*Noeninger v. Vogt*, 88 Mo. 593), and thereby increasing the damage, though malice was implied from the words spoken.

It is said that "malice, in legal understanding, implies no more than willfulness": *Buckley v. Knapp*, 48 Mo. 161. Again, malice in law is defined as "the malice which is inferred from doing a wrongful act without lawful justification or excuse": *Starkie on Slander and Libel*, sec. 336. *Townshend* says: "The distinction between malice in law and malice in fact has been supposed to consist in this, that the one is inferred and the other is proved. The supposed distinction is unreal and unsound; for, first, there is no distinction between what is inferred and what is proved—what is, or is supposed to be, rightly inferred is proved": *Townshend on Slander and Libel*, sec. 87, p. 68.

We may say, then, that malice, whether express or implied, means the same, the only difference being in the establishment of it. When malice is implied from the words spoken or published the burden is on the defendant to prove lawful justification or excuse or the absence of a malicious intent. On the other hand, if the words themselves do not imply malice, the burden rests upon the plaintiff to establish it. When malice exists punitive damages may be given, and it cannot be seen why a distinction should be made, ³⁷¹ when the evil intent existed, whether implied or proved. It is true a distinction is made by some courts, and it is held that, unless express malice is proved, exemplary damages should not be allowed. This line of decision was followed by the St. Louis court of appeals in *Nelson v. Wallace*, 48 Mo. App. 193, and *Fulkerson v. Murdock*, 53 Mo. App. 156.

It is argued that punitive damages are only allowed in trespass, and other actions for torts when the offense is committed in a wanton, rude, and aggravated manner, indicating oppression or a desire to injure, and that no reason can be seen for the application of a different rule in cases for slander or libel. We think the distinction does not in fact exist. Malice is implied in the willful doing of any wrongful act, without justification or excuse, whereby injury is done to another, whether it be to his character, his person, or his

property; where such act is done maliciously, therefore, the injured person should be entitled to exemplary damages, and it would be immaterial whether malice was implied from the nature of the act itself or inferred, as a fact, from all the circumstances under which it was committed. The question is whether the wrong was done willfully and without lawful justification or excuse.

Whatever the decisions of the other states may be, there seems no just ground for distinguishing between malice in fact and malice in law, in respect to the right to exemplary damages, in action for libel and slander, and the decisions of this state make no such distinction. In *Buckley v. Knapp*, 48 Mo. 161, an instruction was approved which authorized the recovery of punitive damages, upon implied malice alone, and that decision was followed in the subsequent case of *Clements v. Maloney*, 55 Mo. 359, and the doctrine has, since these decisions, been regarded as settled.

³⁷² It is said in *Bergmann v. Jones*, 94 N. Y. 62: "The falsity of the libel is sufficient proof of malice to uphold exemplary damages, and plaintiff's right to recover them is in the discretion of the jury. When the falseness of the libel is proved, as a general rule, it is sufficient to warrant the jury in giving exemplary damages." This ruling was approved by the same court in *Warner v. Press Publishing Co.*, 132 N. Y. 183, and expressly followed in *Hintz v. Graupner*, 138 Ill. 158. To the same effect is the case of *Blocker v. Schoff*, 83 Iowa, 269.

4. Exemplary damages may always be given in suits for slander when the words are maliciously spoken, but whether such damages should be given, in any case, is a matter within the discretion of the jury. In order to show good faith and want of malice the defendant has the right to put in evidence all the circumstances under which the words were uttered, and if such circumstances tend to rebut malice, such damages could only be awarded in case the words were maliciously spoken, but may, in themselves, be sufficient proof if malice is implied therefrom.

Plaintiff, by innuendo, charged that defendant, by the slanderous words used, intended to impute to him corruption in office. Defendant, by answer, and in mitigation of damages, admitted that the words spoken had respect solely to plaintiff's official conduct. Defendant offered, as was his right to do, evidence tending to prove the circumstances

under which the objectionable words were used in order to prove good faith and want of malicious intent. As has been said, defendant, as an interested citizen, had the right to make reasonable comment and fair criticism upon plaintiff's official conduct, but he had no right to go beyond that and slander him. It was, in view of all the circumstances, for the jury to say how far the evidence mitigated the malice, ³⁷³ if at all, and to award the damages accordingly. We think the effect of the instruction on the measure of damages was to ignore this defense, and, as the question of exemplary damages was a matter independent of the right to recover, the error was not cured by the first instruction, which required a finding that the words were maliciously spoken, in order to a recovery for any amount. Exemplary damages are given by way of punishment, and the jury should be so instructed thereon as to leave no doubt on the subject.

5. There was no error in refusing to permit defendant to testify as to the motives which actuated him in speaking the defamatory words, so far as the testimony affected the right to recover compensatory damages. The effect would be the same, though he meant to say one thing and said another. He is answerable for so inadequately expressing his meaning: Newell on Defamation, Slander, and Libel, sec. 22, p. 301; *McGinnis v. Knapp*, 109 Mo. 148.

But the motives or purposes with which the words were spoken lie at the very foundation of malice. They are the very conditions upon which exemplary or punitive damages are predicated, and no good reason appears why defendant should not be permitted to prove what his motives were.

Odgers says: "In all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. The plaintiff is still entitled to reasonable compensation for the injury he has suffered; but, if the injury was unintentional, or was committed under a sense of duty, or through some honest mistake, clearly no vindictive damages should be given. In every case, therefore, the defendant may, in mitigation of damages, give evidence to show that he acted in good faith and with honesty ³⁷⁴ of purpose, and not maliciously": Odgers on Libel and Slander, 317.

"Upon principle the spirit and intention of the party publishing a libel are fit to be considered by a jury in estimating the injury done to the plaintiff; and evidence tending to

prove it cannot be excluded simply because it may disclose another and different cause of action": Starkie on Slander and Libel, sec. 639.

"The intent—meaning the intent to effect certain consequences—with which an act is done is material on the question of the amount of damages; the absence of a bad intent will mitigate the damages; the presence of a bad intent will aggravate them": Townshend on Slander and Libel, sec. 91.

We think evidence of the intention and motive of defendant was admissible for the purpose of mitigating the punishment, by way of exemplary damages; but the jury should have been cautioned not to allow such evidence to operate as a defense to the action, or to mitigate the actual damages sustained.

6. It does not appear upon the face of the acceptance offered in evidence that it authorized any particular person to collect the amount due for putting in the curbing, yet delivery to, and possession by, one who had only done a small portion of the work was a circumstance which may have given the holder an advantage, and we think the certificate should have been admitted for what it was worth. The transaction, in which the certificate was issued by plaintiff, was commented upon by defendant, in the discussion in which the slanderous words were used, and defendant had the right to place the whole matter before the jury for the purpose of showing good faith and want of actual malice.

For the same reason defendant should have been permitted to show what he had been told by others in ²⁷⁵ reference to this acceptance: *Blocker v. Schoff*, 83 Iowa, 265; *Orth v. Featherly*, 87 Mich. 320.

7. There was no error in refusing to permit witness Lane to testify as to his understanding of the slanderous words used by defendant. A witness may testify to the speaking of the slanderous words "together with all the attendant circumstances and connections, the existing facts; and, after having done so, it is for the jury to determine from the evidence . . . what was meant": Newell on Defamation, Slander and Libel, 308, and cases cited in note.

For the errors noted the judgment is reversed and the cause remanded.

BARCLAY J., absent; the other judges concur.

SLANDER—PRIVILEGED COMMUNICATIONS.—DISCUSSION OF OFFICIAL CONDUCT: See the extended note to *Shurtliff v. Stevens*, 31 Am. Rep. 709, and the notes to *Vanderzee v. McGregor*, 27 Am. Dec. 158, and *Bodwell v. Osgood*, 15 Am. Dec. 232.

SLANDER—PRIVILEGED COMMUNICATION A QUESTION FOR THE COURT.—Whether a communication is privileged is a question of law: *Jones v. Forehand*, 89 Ga. 520; 32 Am. St. Rep. 81; *Fresh v. Cutter*, 73 Md. 87; 25 Am. St. Rep. 575, and note; *Jellison v. Goodwin*, 43 Me. 287; 69 Am. Dec. 62.

SLANDER—OFFICE OF THE INNUENDO.—The office of the innuendo is merely to explain the words spoken: *Patterson v. Wilkinson*, 55 Me. 42; 92 Am. Dec. 568; *Coburn v. Harwood*, Minor, 93; 12 Am. Dec. 37, and note at page 45; *McLaughlin v. Fisher*, 136 Ill. 111; *Powell v. Crawford*, 107 Mo. 595. See, also, the extended note to *Van Vechten v. Hopkins*, 4 Am. Dec. 349.

SLANDER—IMPLIED MALICE—DAMAGES.—Malice is implied from the use of opprobrious epithets which are slanderous *per se*; and proof of special injury is not necessary to a recovery of damages: *Savoie v. Scanlan*, 43 La. Ann. 967; 26 Am. St. Rep. 200, and note. Where the proof shows that actionable words were spoken by the defendant, and that a slanderous charge contained in them was untrue, the law will imply malice, and the jury may award exemplary damages: *Hintz v. Graupner*, 138 Ill. 158.

SLANDER.—EXEMPLARY DAMAGES IS A QUESTION FOR THE JURY: *Wimer v. Allbaugh*, 78 Iowa, 79; 16 Am. St. Rep. 422. The measure of damages in an action for slander is a question for the jury to consider relatively with that of malice: *Davis v. Ruff*, Cheves, 17; 34 Am. Dec. 584. In actions for libel and slander questions of damages and malice are mixed questions of law and fact, of which courts are more competent to judge than juries are: *Savoie v. Scanlan*, 43 La. Ann. 967; 26 Am. St. Rep. 200. See, also, the extended note to *Terwilliger v. Wands*, 72 Am. Dec. 429.

SLANDER—EVIDENCE IN MITIGATION OF DAMAGES.—Facts tending to show that there was no actual malice may be proven in mitigation of damages: *Hintz v. Graupner*, 138 Ill. 158. See, also, the extended notes to *Terwilliger v. Wands*, 72 Am. Dec. 430, and *Alderman v. French*, 11 Am. Dec. 130.

EGGER v NESBITT.

[122 MISSOURI, 667.]

VENDOR AND PURCHASER—CONTRACT FOR SALE OF LAND—OFFER AND ACCEPTANCE.—An offer by a vendor by letter to execute a quitclaim deed to land upon the payment of a certain sum, accepted by the vendee by letter on condition that other deeds and conveyances of the title to the land are turned over to him, does not constitute a contract which can be specifically enforced. In order to constitute such transaction a valid contract, the acceptance must be unconditional, and in strict accordance with the offer.

VENDOR AND PURCHASER—OFFER TO SELL LAND.—CONDITIONAL ACCEPTANCE of an offer to sell land amounts to a rejection of the offer, and a subsequent unconditional acceptance made before the offer is withdrawn does not constitute a valid contract which can be specifically enforced.

VENDOR AND PURCHASER—CONTRACTS FOR SALE OF LAND—OFFER TO SELL.

--**CONDITIONAL ACCEPTANCE—PLACE OF PAYMENT.**—In case of an offer by a person in one state to sell land in another state at a certain price, an acceptance of the offer, directing the deed to be sent to a bank in the latter state, to be delivered on payment of the purchase money, does not create a binding contract, as such offer, not mentioning the place of payment, entitles the vendor to payment at the place of his residence.

G. A. Neal and Cole & Ditty, for the appellant.

Johnson & Lucas, for the respondent.

670 **BURGESS, J.** This is an action for specific performance of a contract of sale, by defendant to plaintiff, of eighty acres of land, to wit: East half of the northeast quarter of section 36, in township 38, range 28, in St. Clair county, Missouri. Plaintiff bought the land at a sale of it for taxes, and subsequently sold it to one Larkins, who took possession of and improved it.

The petition avers that defendant owns the patent title to the land, which he, for and in consideration of the sum of four hundred dollars, to be paid to him by plaintiff, agreed and promised in writing to convey to him, plaintiff, and that he is ready and willing to pay said purchase money, here offers to do so, and prays that defendant be required to comply with the terms of his contract, and for all proper relief. The answer is a general denial. Defendant had acquired the patent title to the land, and plaintiff began negotiating with him for its purchase, and wrote to him in regard to the matter. To this letter defendant replied from Washington City, where he then resided, as follows:

671 "WASHINGTON, D. C., Feb. 26, 1890.

"*F. Egger, Esq., Appleton City, Mo.,*

"DEAR SIR: Your letter of December 30 was addressed to me at Osceola, Missouri, and, although I was in Osceola about that time, I received all my mail at Lowry City, and the letter laid at Osceola for some time, and, when forwarded to me here, went wrong in some way, and I only received it a short time ago.

"Your letter was a very kind one under the circumstances, and I will try to act in the same spirit; and, although we are somewhat apart in our views of this matter, I hope we can adjust it now and in good feeling. When I first purchased these titles I assure you that I did not know that it would in any way bring me in conflict with you or your interests,

as I told you that Mr. Larkin owned the other claim, and I did not know who he got it from. I bought the title from all the heirs, and paid in cash to them \$200, and to agents, attorneys, and for recording, etc., about \$60 or \$70 more; this, at ten per cent interest, would amount to about \$400 at this time.

"I am willing to make a Q. C. deed either to you or to Larkin, pay the costs of the suit, and dismiss it for \$400. I feel that this is a liberal offer, from the standpoint from which I view this case, which is about this: You purchased a tax title against a man who had died in 1855, and I think, also, the records show that it was sold in the name of Alexander Corder, when the correct name was Alexander Cowden, as is shown in the original patent which I have. I hold deeds from all his legal heirs, which I think clearly gives me the title. I think you sold the land many years ago to Larkin for \$800. You have had the use of this money all these years on a tax title which only cost you a few dollars.

673 "I have laid out of my money for five years, and the amount named will only let me out whole, while you still have a small profit, and will be able to keep good faith with your purchaser, Mr. Larkin, and close the entire matter with all parties satisfied. The suit was only filed to save the statute of limitation, and was in no way intended to annoy you; but if we are to settle it, please let me hear from you soon, as I think your court comes in March or April, and, like you, I don't want any law whatever between us. We are well.

"Yours, with respect,

"SCOTT NESBITT."

To this letter plaintiff made reply March 4, 1890. Leaving out the formal parts and immaterial matter the reply is as follows:

"I will accept your proposition, with the understanding that you will deliver to me all the papers you have in reference to the land, U. S. patent, and other deeds. You may make Q. C. deed in blank, and send it with the other papers to J. B. Egger, and authorize him to insert either my name or Mr. Larkin's, whichever may be proper, and he will return the four hundred dollars to you, as you may direct."

Plaintiff received no reply from the defendant to the above

letter, and on March 14th again wrote to the defendant, as follows:

"Scott Nesbitt, Esq., Washington, D. C.,

"DEAR SIR: On the 4th inst., I sent you a letter in reply to your letter of February 26, stating that I accept your offer in regard to the Alexander Cowden land, e. h. f. n. e. 1-4 sec. 36, town. 38, range 28, St. Clair county, and requested you to send Q. C. deed, name of party blank, and authorize J. B. Egger to insert either my name or Mr. Larkin's as may be found proper. As no answer or deed from you is received yet, ⁶⁷³ I would request you, if deed is not yet sent, to please make it complete and insert my name, Fredolin Egger. John B. Egger will remit the amount, four hundred dollars, to you, as stated in my former letter. I will perhaps be compelled to be away for some time, and wish to have this business settled before."

Both of the above letters from plaintiff to the defendant were deposited upon the dates they were written, respectively, sealed in envelopes, directed to Scott Nesbitt, 1333 F street, N. W., Washington, D. C., in the United States postoffice at Appleton City, Missouri, with the postage thereon fully prepaid. The address to which the above-named letters were sent was Scott Nesbitt, 1333 F street, N. W., Washington, D. C.

On March 31, 1890, plaintiff caused to be sent to defendant, to the same address as above, the following dispatch:

"F. Egger has deposited four hundred dollars to be paid to you on receipt of certain deeds.

"JOHN B. EGGER, Cashier."

Plaintiff had then deposited in the First National Bank at Appleton City, Missouri, the four hundred dollars to be paid to defendant upon the delivery of the deed to said land. Defendant did not receive the letter of March 4th, but did receive that of March 14th, and also the dispatch which was sent to the same address.

On May 1, 1890, defendant addressed a letter to John B. Egger, which is as follows:

"WASHINGTON, D. C., May 1, 1890.

"John B. Egger, Esq., Appleton City, Mo.,

"DEAR SIR: Some weeks ago (March 31) I received a telegram from you saying that F. Egger had deposited four hundred dollars subject to a receipt of a ⁶⁷⁴ 'certain deed,' and about the same date a letter from your father saying that he

had addressed two letters to me, and asking if they had been received. I at once wrote to you that such letters had not been received, and asking their purport, and to what deed he had referred. I took it that it meant the Larkin-Cowden land, as way along, I think, in February last, I had written to him again, trying to adjust that cause before I had to take depositions, etc., but as I did not hear from him, concluded that he did not wish to settle, and made other arrangements.

"This was about the substance of my letter. As I have not heard from you, thought you had overlooked in some way. Please let me hear from you. All well and busy.

"Yours truly,

"SCOTT NESBITT."

At the close of plaintiff's evidence the court found for defendant, dismissed the petition, and rendered judgment against plaintiff for costs. Plaintiff, after taking the usual course, prosecutes his appeal to this court.

It may be conceded that a contract may be made by letter or telegram, and that when the offer is made by letter and is accepted by letter, although the letter accepting the offer never reaches the hand of the person making the offer, providing the acceptance is mailed in due time, postage prepaid, and directed to the proper address of the person making the offer, or, if accepted by telegram, the charges being prepaid, and directed as before stated in regard to the acceptance by letter, and the acceptance be made within a reasonable time, no time being fixed, or before the offer is withdrawn: Bishop on Contracts, sec. 328; *Whaley v. Hinchman*, 22 Mo. App. 483; *Greely-Burnham Co. v. Capen*, 23 Mo. App. 301. Note to *Maclay v. Harvey*, 32 Am. Rep. 40; *Lancaster v. Elliott*, 42 Mo. App. 503; *Tayloe v. Merchants' Fire Ins. Co.*, 675 9 How. 390. But the acceptance must be unconditional and in strict accordance with the proposition; that is, the mind of the person making the offer and of the one accepting it must meet in regard to the same subject matter and terms of sale: *Eads v. Carondelet*, 42 Mo. 113; 1 Parsons on Contracts, 7th ed., *475; *Green v. Cole*, 103 Mo. 70.

In *Bruner v. Wheaton*, 46 Mo. 363, the court says: "In order that an acceptance may be operative it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay. To constitute a valid contract there must be a mutual assent of the

parties thereto, and they must assent to the same thing in the same sense; therefore an absolute acceptance of a proposal, coupled with any qualification or condition will not be regarded as a complete contract, because there at no time exists the prerequisite mutual assent to the same thing in the same sense. Any words manifesting an *aggregatio mentium* are sufficient to constitute a contract, but the mutual consent—the *aggregatio mentium*—cannot be attained without the assent of both parties.”

Measured by the rule thus announced, plaintiff's letter to defendant of March 4, 1890, was not an acceptance of the proposition contained in defendant's letter to him dated February 26, 1890, for the reason that the acceptance was not unconditional, but with the understanding that defendant would deliver to him all the papers in reference to the land, United States patents and other deeds, about which there was nothing said in defendant's letter, or proposition, thereby making a new proposition of his own and imposing new burdens upon defendant, though light they may have been. As the conditions upon which the proposition was accepted materially differed from the original ⁶⁷⁶ proposition, it amounted to the rejection of the offer: *Cangas v. Rumsey Mfg. Co.*, 37 Mo. App. 297; *Strange v. Crowley*, 91 Mo. 287; 1 Parsons on Contracts, 7th ed., *477.

It is contended by plaintiff that, even if his letter of March 4, 1890, was no more than a conditional acceptance, yet his letter of March 14, 1890, written prior to any withdrawal of defendant's offer, was an unconditional acceptance of defendant's offer, and that thereby the offer was accepted and the contract closed. Upon the other hand the contention is, that, the plaintiff having rejected the offer of defendant by his conditional acceptance, the offer was at an end, and could not be renewed by a subsequent acceptance of it by plaintiff. *Judd v. Day*, 50 Iowa, 247, is relied upon by plaintiff as sustaining his position, but in that case there was no conditional acceptance of the offer to purchase, and it was rightly held that the offer was a continuing one, unless otherwise specified or withdrawn.

Mr. Parsons, in his work on Contracts, volume 1, seventh edition, star page 477, says: “The party making the offer may renew it; but the party receiving it cannot reply, accepting with modifications, and when these are rejected, again reply, accepting generally, and upon his acceptance claim the right

of holding the other party to his first offer." So in *Baker v. Johnson County*, 37 Iowa, 186, it is held that a proposal to accept, or an acceptance of, an offer upon different terms from those contained in the offer amounts to a rejection of it: See, also, *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *National Bank v. Hall*, 101 U. S. 43.

Plaintiff nowhere alleges a tender of the purchase money to defendant personally, but does allege that he has fully performed all the conditions of said contract ⁶⁷⁷ and agreement on his part at the execution and acceptance of the terms of said agreement; that he paid the defendant by deposit the sum of four hundred dollars at the First National Bank, in Appleton City, St. Clair county, Missouri, and notified defendant of the fact. He also alleges a refusal by defendant to execute the deed, and a readiness upon his part to pay the purchase price for the land.

At the time of the offer by defendant he was a resident of Washington City, D. C., which was well known by plaintiff, where, by the terms of his offer, he was entitled to payment, and the deposit of the money in the bank at Appleton City was no payment or offer to pay the purchase money to him, and was not an acceptance of the contract. There is no pretense that the money was deposited in the bank, by or with the consent or direction of defendant, and in the absence of something of that kind defendant was entitled to payment at the place where or the city which was at the time his place of residence. In *Gilbert v. Baxter*, 71 Iowa, 327, it is held that, "in case of an offer by a person in one state to sell land in another state at a certain cash price an acceptance, directing the deed to be sent to a bank in the latter state, to be delivered on payment of the price, will not create a binding contract, as the terms of the offer entitle the vendor to payment in his own state": See, also, *Sawyer v. Brossart*, 67 Iowa, 678; 56 Am. Rep. 371; *Langellier v. Schaefer*, 36 Minn. 361.

In the case in hand plaintiff directed the deed to be made out in blank, to be sent to the bank, and upon receipt thereof the money to be paid over to defendant; this was not an acceptance of the offer to sell as made by defendant.

The burden of proof rested upon the plaintiff to show, by clear and satisfactory evidence, the contract ⁶⁷⁸ which he seeks to have specifically enforced; that is, that his acceptance of the offer of defendant was unequivocal, unconditional,

and without any variance of any sort between it and the proposal, and, as he failed in this, he was not entitled to the relief which he sought.

The judgment is affirmed.

All of this division concur.

VENDOR AND PURCHASER—OFFER TO SELL—ACCEPTANCE.—The acceptance of an offer to sell real estate, in order to be binding, must be without qualification: *Kennedy v. Gramling*, 33 S. C. 367; 26 Am. St. Rep. 676.

VENDOR AND PURCHASER—OFFER TO SELL—ACCEPTANCE — PLACE OF PAYMENT.—An acceptance of an offer to sell land, but fixing a different place for the delivery of the deed and payment of the money than the residence of the respective parties or the place named in the offer, is not an unconditional acceptance so as to bind the seller: *Northwestern Iron Co. v. Meule*, 21 Wis. 474; 94 Am. Dec. 557, and note.

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CASES
IN THE
SUPREME COURT
OF
MONTANA.

• —————

KLEINSCHMIDT v. BINZEL.

[14 MONTANA, 81.]

RES JUDICATA.—If a CAUSE OF ACTION IS SUBMITTED UPON DEMURRER and adjudged insufficient by a judgment sustaining such demurrer on the merits the plaintiff and his privies and representatives are thereby barred from asserting the same facts in another action pertaining to the subject, as effectually as though such facts were found from the proofs or expressly admitted during the trial.

RES JUDICATA.—A JUDGMENT AGAINST PLAINTIFF UPON DEMURRER does not preclude him from subsequently asserting the same facts accompanied by additional allegations which complete the statement of a cause of action or of defense defectively stated in the former action or proceeding. Nor does the decision against the plaintiff on demurrer, on the ground that the remedy he seeks is not a proper one upon the facts charged, estop him from maintaining another and different action which those facts are adequate to support.

RES JUDICATA—JUDGMENT ON THE MERITS.—If the first suit was disposed of for defects in the pleadings or parties, or a misconception of the form of the proceeding, or a want of jurisdiction, or on any ground which did not go to the merits of the action, the judgment will prove no bar in another suit.

RES JUDICATA—BURDEN OF PROOF.—It MUST CLEARLY APPEAR from the record in a former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of *res judicata* is invoked as a bar was, in fact, necessarily adjudicated in the former action. If there be any uncertainty on this head in the record the whole subject matter of the action will be at large and open to new contentions, unless such uncertainty is removed by extrinsic evidence showing the precise point involved and determined.

RES JUDICATA—UNCERTAIN GROUNDS OF JUDGMENT.—A JUDGMENT FOR THE DEFENDANT UPON A DEMURRER SPECIFYING that the complaint does not state facts sufficient to constitute a cause of action, and that there is a misjoinder of causes of action and of parties, merely means

that the court finds some one of these causes of demurrer is good, and not that all are found good; and, in the absence of evidence that the judgment was upon the merits, it cannot constitute a bar to a subsequent action based upon the same facts.

EJECTMENT. Defendant denied the allegations of the plaintiff's complaint, and interposed a cross-complaint averring that the defendant on June 5, 1880, was in possession of real property, including the lot sued for in this action, under an agreement entered into between him and Deborah M. Hoyt and her husband, whereby they agreed to convey such property to the defendant; that under such agreement defendant made certain valuable improvements and became financially embarrassed and unable to pay four thousand dollars which was due to Mrs. Hoyt and her husband for the balance of the purchase price; and to provide means with which to make such payment defendant entered into an agreement with Carl Kleinschmidt and William H. Weimer in writing, and of which plaintiff had notice, and in which it was stipulated that the other parties thereto would pay one-half of the indebtedness due from the defendant for the undivided one-half interest in the property, and would loan two thousand dollars with which he could pay the balance of the indebtedness, and that the title to such property should be conveyed by Hoyt and wife to Carl Kleinschmidt and Weimer; that to carry out such agreement defendant conveyed the property to them, and thereupon procured a conveyance thereof to them from Hoyt and wife; that at any time within three years after January 5, 1880, if defendant should repay the two thousand dollars he was to have executed to him a conveyance of his undivided one-half of the property, and that he, within the time designated, had tendered such sum and demanded a conveyance. The defendant prayed judgment quieting his title to the undivided one-half of the property. Plaintiff, in reply to the cross-complaint, pleaded that in June, 1883, defendant had commenced an action against Carl Kleinschmidt, Reinhold H. Kleinschmidt, James M. Ryan, Michael Jacobi, William H. Weimer, and Albert Kleinschmidt, alleging the same facts charged in the cross-complaint herein, and demanding the same relief, and further averring a partnership between himself, Weimer, and Carl Kleinschmidt to carry on business on the property in question, and the violation by them of the partnership agreement, and certain injuries and damages resulting therefrom. This

complaint was demurred to on the ground hereinafter stated in the opinion of the court, and the demurrer was sustained, and a judgment thereon entered. Judgment in the present action was rendered in favor of the plaintiff, on the ground that defendant was precluded by the former judgment from asserting the matters alleged in his cross-bill, and he thereupon appealed.

McConnell, Clayberg & Gunn, for the appellant.

Toole & Wallace, for the respondent.

⁵¹ HARWOOD, J. Defendant having alleged in his cross-complaint those contracts and transactions concerning the land in controversy, shown in the above statement of the case, demanding affirmative relief, plaintiff set up in bar thereof the complaint ⁵² of defendant in an action which he commenced in 1883; wherein he alleged substantially the same facts, and demanded substantially the same relief, as in his cross-complaint in the present action. To which complaint in the defendant's action, in 1883, demurrer was interposed and sustained, and no further action was taken therein. And the plaintiff here, who was one of the defendants in the action of 1883, avers that he has succeeded to the rights of all the other defendants in that action. Wherefore, he insists that, by said proceedings in the former action, the right, title, and equity claimed by Binzel, defendant here, in and to the property in controversy, has "been adjudicated and determined, by reason whereof he is estopped from asserting his pretended claim to said property." In this position plaintiff was sustained by the ruling of the trial court.

Appellant has made some attempt to point out differences or distinctions between the complaint of Binzel in the action of 1883 and his cross-complaint in the present action. But a careful comparison of these pleadings we think discloses a substantial similarity in the facts alleged and relief sought; with this exception, that the complaint of 1883 went further than the cross-complaint in this action, and contained allegations in reference to an alleged copartnership compact engaged in between Binzel and certain of those defendants, and a violation thereof, and other grievances, for which he demanded a large amount of damages. As to those matters the cross-complaint in the present action is silent. But in so far as it goes in alleging the contracts and facts, on which Binzel claims rights of ownership and possession in and to

the tract of land in controversy, the cross-complaint to this action is substantially the same as his complaint of 1883 on that branch of the case.

The authorities support the proposition urged by respondent that if the alleged cause of action is submitted on the merits by demurrer, admitting the facts alleged, but placing over against them in the judicial scale the proposition of law that the facts pleaded and thus admitted are insufficient to warrant judgment in favor of the pleader; and upon due weighing of the law and the facts those facts are adjudged insufficient by sustaining the demurrer, and this ruling is allowed to stand; those facts thereby pass under the rule of things adjudicated; ⁵³ and the party against whom such adjudication proceeds, as well as his privies and representatives, are thereby barred from again asserting the same facts in another action pertaining to the subject as effectually as though such facts were found from the proof or admitted *ore tenus* in the course of the trial. Such appears to be the rule deducible from the authorities, without much conflict: *Gould v. Evansville etc. R. R. Co.*, 91 U. S. 526; *Bissell v. Spring Valley*, 124 U. S. 225; *Griffin v. Seymour*, 15 Iowa, 30; 83 Am. Dec. 396; *Robinson v. Howard*, 5 Cal. 429; *Bouchaud v. Dias*, 3 Denio, 238; *People v. Stephen*, 51 How. Pr. 235.

But this rule should always be stated and applied with due regard to some modifying conditions, which it is not permitted to violate. Thus, when the pleader has submitted to the ruling of the court on demurrer, against the sufficiency of the cause of action or defense, as stated, that ruling would not bar him or those in privity with him from again asserting the same facts, accompanied by additional allegations which complete the statement of a good cause of action or defense: *Gould v. Evansville etc. R. R. Co.*, 91 U. S. 526. Nor where an action is commenced to effectuate a certain purpose—such as specific performance or to obtain injunction—and demurrer is interposed and sustained on the ground that the complaint does not show facts sufficient for such action—that is, to invoke such relief—such ruling would be no bar to an action for the proper remedy. It being pointed out in the consideration of such demurrer that, although the plaintiff, for instance, alleges an agreement for the sale and purchase of a piece of real property, and payment of part, or even all, of the purchase price, and the breach of such agreement by the vendor; still, if no other equities were shown, the

court would hold that the complaint, while good for damages, is indeed insufficient to support a decree for specific performance (*Boulder Valley etc. Co. v. Farnham*, 12 Mont. 1), and would therefore sustain the demurrer. It may be said that this would be on the ground of want of jurisdiction. But that arises because of insufficient showing of facts to support the relief asked. The pleader would have mistaken his remedy, and, under a system where courts of law and equity were separate, the demurrer in such ⁵⁴ cases would prevail, and the party be remitted to the proper court and action for redress. And under our united jurisprudence, where equitable and legal remedies are administered in the same court, and frequently in the same action, the demurrer in such a case, as instanced, would undoubtedly prevail, because the relief asked could not be granted on the facts stated; and although the court might have jurisdiction under our united system to grant other relief, it would probably not be forced upon the plaintiff until he had shaped his action to that end. But when he came into court with his suit for damages, it would be found that he pleaded the same transaction and breach whereby he would allege he was damaged in a certain sum, for which he would ask judgment. Likewise, if the action was commenced prematurely, as appeared on the face of the complaint, it would be held insufficient on demurrer for that cause: *Shelden v. Edwards*, 35 N. Y. 286. If it were held, in such cases, that the order sustaining the demurrer devitalized the facts first pleaded it would prevent setting up those facts in another action, at the proper time, or in the proper form, and for available relief. So it is said by eminent authority in considering these conditions: "If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceedings, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment will prove no bar to another suit": *Hughes v. United States*, 4 Wall. 232.

It is clear, however, that defendant's cross-complaint falls within the rule, and not the exception. He has in the case at bar reasserted substantially the same facts as in complaint of 1883, with no additional matter; and he asks substantially the same character of relief. Demurrer was sustained to his complaint, and that ruling stands in force. Therefore, it we had no further point for consideration, we should, without hesitation, affirm the ruling of the trial court, that the

matter pleaded in the cross-complaint is *res adjudicata*, and therefore barred. But before proceeding to that conclusion it must be inquired whether it is shown that the demurrer to Binzel's complaint of 1883 was sustained on consideration of the merits; for the authorities harmoniously concur in the proposition ⁵⁵ that it must clearly appear from the record in the former case, or be proved by competent extraneous evidence, that the matter as to which the rule of *res adjudicata* is invoked as a bar was in fact adjudicated in the former action.

Upon this point it is said by Mr. Justice Nelson, in *Packet Co. v. Sickles*, 5 Wall. 592: "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined; that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded."

And again, in the case of *Russell v. Place*, 94 U. S. 608, Mr. Justice Field, in expressing the opinion of the court, observes:

"It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record, as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed,

without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject matter of ⁵⁶ the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.

"Thus, in the case of the *Washington etc. Steam Packet Co. v. Sickles*, 24 How. 333, a verdict and judgment for the plaintiff in a prior action against the same defendant on a declaration, containing a special count on a contract, and the common counts, was held by this court not to be conclusive of the existence and validity of the contract set forth in the special count, because the verdict might have been rendered without reference to that count, and only upon the common counts. Extrinsic evidence showing the fact to have been otherwise was necessary to render the judgment an estoppel upon those points.

"When the same case was before this court the second time (*Packet Co. v. Sickles*, 5 Wall. 580), the general rule with respect to the conclusiveness of a verdict and judgment in a former suit between the same parties, when the judgment is used in pleading as an estoppel, or is relied upon as evidence, was stated to be substantially this: That, to render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined; that is, that the verdict in the suit could not have been rendered without deciding that matter, or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Announcements to the same effect could be drawn from many other cases of undoubted authority: See *Hughes v. United States*, 4 Wall. 232; *Lore v. Truman*, 10 Ohio St. 53; *Estep v. Larsh*, 21 Ind. 196; *Keller v. Stolzenbach*, 20 Fed. Rep. 47; *Woodland v. Newhall*, 31 Fed. Rep. 434; *Dygert v. Dygert*, 4 Ind. App. 276.

Now it appears that the demurrer in the former action specified eight objections to the complaint, but the same may be properly consolidated into three statutory grounds of demurrer, ⁵⁷ namely: 1. Want of sufficient facts alleged to consti-

tute a cause of action; 2. Misjoinder of causes of action; 3. Misjoinder of parties defendant. The other nominal objections are merely specifications of particulars in which the complaint is wanting or defective on some of those grounds. The record does not disclose the particular ground upon which the court sustained the demurrer. As to that ruling it is recorded that the demurrer was sustained by the court. But respondent's counsel insists that from the general order sustaining the demurrer the presumption follows that it was sustained on all the grounds alleged against the complaint in the demurrer. This view, although urged by an admirable argument contained in respondent's brief, and sought to be supported by citations of authority, we think cannot be maintained, because it is contrary to reason and the rule of law upon this subject sustained by the great weight of authority. The case of *People v. Sterens*, 51 How. Pr. 235, among others cited by respondent in support of the presumption which he contends for, appears to be the nearest in point. It is a New York decision, not of the last resort, but of the supreme court, general term. The demurrer under consideration in that case went to three grounds: Defect of parties; improper joinder of causes; and want of sufficient facts alleged to constitute a cause of action. The demurrer was sustained by a general order, not showing whether upon one or more of the alleged grounds of objection to the complaint. When this judgment was pleaded in bar of setting up the same facts in another action it was insisted that the demurrer in the former action was sustained upon all the grounds of the objection stated therein. In considering that proposition the court said:

"It was according to the order and judgment, 'the demurrer,' which came on for argument at the special term, and it was 'upon the demurrer' that the judgment in favor of defendant was given. It was sustained, not in part, but as a whole, and that could only be done by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented."

With due deference, we are unable to adopt or follow that holding. It seems to us a moment's reflection suffices to ^{ss} show that the conclusion there stated contradicts the real state of the law, as well as the constant practice of the courts. It is well known that, if either ground of the demurrer is sustained, that is sufficient to support the order

sustaining the demurrer. How, then, could it be affirmed that the demurrer could only be sustained "by reaching a conclusion unfavorable to the plaintiffs upon every issue which it presented." That untenable conclusion is reached by arbitrarily declaring that the demurrer was sustained as a whole, when the same order could have been made on finding only one objection well founded. It would seem as proper to presume from the fact that several shots were fired by one person at another, either of which taking effect in a vital spot would produce death, and death ensued, that every shot hit the mark with fatal effect, and so hold without any further showing.

There is a presumption following a judgment that those things were adjudicated, without which the judgment could not have been rendered. This proposition is frequently asserted in the authorities, and is well founded, because it is an inherent implication that those things were considered and determined, without which the ultimate conclusion would not have been announced. This implication shows that the court in sustaining the demurrer held some one of the grounds fatal to the complaint, stated in the demurrer, well founded; for without such finding the ultimate conclusion that the demurrer be sustained would not have been announced by the court. But this is not sufficient to maintain respondent's position. To support that position the presumption must go farther, and cover the broad proposition that by a ruling sustaining a demurrer which attacks the complaint by several fatal objections it must be presumed that the court adjudicated and held good all the grounds which the demurrer set forth. This proves too much, and thereby weakens the proposition so that it falls of its own untenable weight. Because from that presumption it follows that where the complaint is demurred to on several grounds, such as misjoinder of causes, and also misjoinder of parties, and want of sufficient facts to constitute a cause of action, as in the case of the demurrer to Binzel's complaint of 1883, if the court adjudicated and determined every ⁵⁹ ground unfavorable to the plaintiff, it proves that the court, while holding that the case was not in court in proper form of action, but contained a misjoinder of causes which could not be lawfully adjudicated together, and also a misjoinder of parties defendant contrary to the provisions of law, nevertheless, being aware that the case was not properly before

it, the court determined to hold the case fast in its grasp, and pass upon the merits. Such is the inevitable effect of presuming, from the order merely sustaining such a demurrer, that the court passed upon and sustained all the grounds the demurrer alleged. The impropriety of such action seems plain, and we therefore think the current of presumption is the other way, as directly held by the supreme court of Iowa, in *Griffin v. Seymour*, 15 Iowa, 30, 83 Am. Dec. 396, where it was held that in such a case it would be presumed that the court, having found some formal defect, by reason of which the case was not properly in court, would not then proceed to consider and pass upon the merits. This is also in accord with the reasoning and conclusion of a great number of cases (some of which have been cited *supra*), that it must be clearly shown that the very matter as to which the bar of *res adjudicata* is invoked was adjudicated and determined on the merits in the former action. That it is not enough that such matter was attempted to be drawn in question if the same decision could have been rendered without its adjudication; that is, if its adjudication is not inherently implied in the judgment, it will not be held barred unless the record is supplemented by extraneous proof to the effect that such matter was adjudicated. The very rule that such evidence may be introduced in its tendency contradicts the idea that the uncertainty will be covered by presumption.

The application of the presumption contended for by respondent would, we think, frequently contradict or suppress the real fact with unjust consequences. Suppose a complaint is filed which is subject to the objection of misjoinder, or defect of parties, or improper joinder of causes of action. And, a demurrer having stated these grounds, also alleges the untenable ground of insufficient facts to constitute a cause of action. Now, the court, in considering the demurrer, would find one of the first mentioned objections well founded. But as to the ⁶⁰ latter objection the court would either not consider it at all, because the case was not properly in court, or, if the court did consider that objection, it would be found untenable. But for the other defects the demurrer would be sustained. Thereupon an order would be entered to the effect that the demurrer is sustained. The defect fully supports that order, and we venture that in a great majority of cases in our practice, where the demurrer is used with great frequency, no more specific order would be entered. In such a case, if the

plaintiff and his counsel who attended the argument concluded the court was right in its ruling on the demurrer, because there was a misjoinder or defect of parties, or an improper union of causes, they would not appeal, for the appeal would be unavailing. Now, if the presumption for which respondent contends be established, the plaintiff in such a case would be barred from setting up those facts in another action against the same parties, or some of them, or their privies, free from the former defects, while as a matter of fact the former ruling did not touch the merits. It is said that in such a case it is the plaintiff's duty to see that the entry in the record specifies the ground on which the former ruling was made, or that it was made without prejudice to another action, and a case is cited in support of that view: *Foots v. Gibbs*, 1 Gray, 412. It may well be answered that the time has come when it is not considered altogether amiss to claim some duties as due from the court toward litigants; and one should be to so shape the entry of court rulings in its record as not to raise unjust and untrue implications against the suitor, of which he is not the author, to burden or defeat his effort to obtain justice. Of course no such thing would be done knowingly, but it would arise in many cases where demurrers are sustained by general order, if the presumption contended for prevailed. And in the multitude of rulings which the trial judge is called upon to make he does not always expound the grounds thereof, nor, if expounded, would they be noted in the record. In the case last above cited it was held that where a cause was dismissed, and the entry of the order showed no qualification, as that it was dismissed "without prejudice," it would be presumed to have been dismissed on the merits. This ruling, however, ¹ would hardly apply under our code: Comp. Stats., sec. 242. Moreover, in a later case (*Foster v. The Richard Busted*, 100 Mass. 412, 1 Am. Rep. 125), the supreme court of Massachusetts cites, but does not follow, *Foots v. Gibbs*, 1 Gray, 412, as correctly announcing the rule of procedure applicable to the conditions mentioned; and likewise did Judge Brewer in *Smith v. Auld*, 31 Kan. 262: See, also, to the same effect the case of *Steam Gauge & Lantern Co. v. Meyross*, 27 Fed. Rep. 213. It is further insisted that section 243 of the Code of Civil Procedure makes it obligatory to render judgment on the merits in all other cases than those stated in the five subdivisions of the preceding section. The con-

text, the whole chapter of which that section is a part, shows that section 243 relates to the case at a stage beyond the formation of the pleadings, where it stands for consideration and judgment on the merits, unless it is dismissed or nonsuited. The interpretation and application of that section, according to respondent's contention, would make a judgment or order on demurrer conclude the merits, even if the demurrer stated no ground which went to the merits, because such a case would be "other than those mentioned in section 242." We think it clear that the provisions of section 243 do not apply to this consideration.

It follows that the order sustaining the demurrer to Binzel's complaint of 1888 might have been based upon defects not touching the merits, and it not having been shown that such judgment proceeded upon a consideration of the merits, the ruling of the trial court holding that the facts set up in the cross-complaint were adjudicated in the proceedings of 1883 cannot be sustained. The judgment in this action is therefore reversed, and the cause remanded to be proceeded with in conformity to the views herein expressed.

PEMBERTON, C. J., and DE WITT, J., concur.

JUDGMENTS ON DEMURRER—CONCLUSIVENESS OF.—A final judgment on demurrer to a petition which goes to the merits renders the whole matter *res judicata*: *Connecticut etc. Ins. Co. v. Smith*, 117 Mo. 261; 38 Am. St. Rep. 656, and note. A decision upon demurrer is conclusive upon the questions legitimately involved: *Ellis v. Northern Pac. R. R. Co.*, 80 Wis. 459; 27 Am. St. Rep. 44, and note.

JUDGMENTS—RES JUDICATA—BURDEN OF PROOF.—Before a judgment in one action can operate as a bar to another it must appear by the record, or by extrinsic evidence, that the precise question involved in the second action was raised and determined in the first: *Bell v. Merrifield*, 109 N. Y. 202; 4 Am. St. Rep. 436; *Haines v. Flinn*, 26 Neb. 380; 18 Am. St. Rep. 785, and note. To the same effect, *Carson v. Clark*, 1 Scam. 113; 25 Am. Dec. 79, and *Wright v. Griffey*, 147 Ill. 496; 37 Am. St. Rep. 228, and note. See particularly the extended note to *Lea v. Lea*, 96 Am. Dec. 785.

McDONALD v. MONTANA WOOD COMPANY.

[14 MONTANA, 88.]

MINING CLAIMS—LOCATION OF.—An association of not less than eight persons may locate a mining claim not exceeding one hundred and sixty acres. It is not necessary that a discovery should be made on each twenty acre tract, nor that each twenty acre tract should be marked off on the surface of the ground, nor that work should be done, nor improvements made on each twenty acres. It is sufficient that one hundred dollars be expended in work or improvements on the whole claim within any one year.

STATUTES GIVING PUNITIVE, DOUBLE, OR TREBLE DAMAGES against one cutting or otherwise converting to his own use timber growing on the land of another without his consent are confined to cases where some element of recklessness, wantonness, willfulness, or evil design enters into the act. Therefore, if the land is located in a wilderness, far from human habitation, and there is nothing to indicate that any one actually asserted ownership of any part of the country thereabout, and there is nothing to indicate willfulness, wantonness, or recklessness, actual damages only will be allowed.

Cowan & Parker, for the appellant.

Thomas Joyes, for the respondents.

¶ PEMBERTON, C. J. On the twenty-third day of September, 1890, plaintiffs (being seven in number) and Thomas Joyes located the Landlock placer mining claim, a tract of ground in Jefferson county, which they estimated at the time contained 160 acres, but which afterward, by a survey, was found to contain about 76 acres. Plaintiffs made but one discovery on the entire tract. They marked the boundaries by blazing a tree at each corner of the entire tract of ground, and designated each of said corners of the claim by writing with a pencil, on the respective blazed trees, the name of the claim, and the ¹ corner each tree represented. They also marked a tree at the discovery shaft, and posted a notice on the claim. The notice contained the names of all the locators, and a description of the ground claimed. The tract of land so located was not in any way subdivided into 20 acre claims, and no other discoveries were made, or marking done on the ground, than as stated above. During the year 1891 plaintiffs did work and made improvements on the entire tract of land to the amount of about \$150. The complaint, which was filed November 21, 1891, charged that in the month of December, 1890, and at divers times between that date and the commencement of this suit, the defendant knowingly, willfully, and maliciously entered upon said land without the consent

of plaintiffs, and cut down and carried away a large amount of trees and timber growing thereon, etc., claiming actual damages in the sum of \$3,000, and asking judgment for treble damages under section 363 of the Code of Civil Procedure. The answer denies the title of plaintiffs, and all the material allegations of the complaint. The case was tried by the court with a jury. The jury returned a verdict for plaintiff in the sum of \$549.63, as actual damages, which they trebled, making the sum of \$1,648.49, for which sum judgment was rendered. Defendant moved for new trial. This motion was overruled. The defendant appealed from the judgment and the order refusing a new trial.

The appellant contends that the location of the mining claim in the manner as above described is a nullity, and conferred upon plaintiffs no right or title to the Landlock placer mining claim, or to the right of possession thereof. The appellant claims that, under the law, the plaintiffs should have made a discovery on each 20 acre tract contained in the land sought to be located; that each 20 acre tract therein contained should have been marked upon the surface thereof, so that the boundaries thereof could have been readily traced; that a separate location of each 20 acre tract was necessary under the law; and that work or improvements of the value of \$100 should have been done on each 20 acre tract contained therein, for the year 1891. Section 2330 of the Revised Statutes of the United States, among other things, provides: "But no location of a placer claim made after the ninth day of July, 1870, ⁹² shall exceed 160 acres for any one person or association of persons." This statute, it seems to us, confers the right upon an association of not less than eight persons to locate not to exceed 160 acres in one claim. This has been the holding and ruling of the United States land department uniformly, as far as we have been able to discover; and patents have uniformly issued in such cases, when there was a showing of an expenditure of \$500 in work or improvements upon any part of the 160 acre claim: See *Good Return Min. Co.*, 4 Dec. Dep. Int. 221; also, *Morrison's Mining Rights*, 7th ed., 134. In *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, Mr. Justice Field, delivering the opinion of the court, says: "The last position of the court below—that the owner of contiguous locations, who seeks a patent, must present a separate application for each, and obtain a separate survey, and prove that upon each the required work has been

performed—is as untenable as the rulings already considered”; and in the same case it is said: “It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations.” In this case just cited Mr. Justice Field is speaking of the things necessary to be done by an applicant to obtain a patent to placer mining ground. In no case, nor in any ruling or decision of the United States land department, that we have been able to find, is it held to be necessary that a separate discovery, separate marking of the boundaries, separate recording, and separate work should be made and performed upon each 20 acres contained in a 160 acre placer claim authorized to be located under one location by an association of persons. If the plaintiffs in this suit had made such a discovery on the ground in controversy, and had made such a location thereof, and were performing such work, and making such improvements thereon, as would entitle them to a patent therefor under the mining laws of the United States, then they had such title and right to possession as would entitle them to prosecute this action for damages for the trespass complained of.

The appellant further contends that the evidence shows that the plaintiffs had forfeited any right or title they may have had to the ground in controversy by failing to do the required ⁹³ amount of work thereon for the year 1891. The evidence in this case shows that work of the value of about \$150 was done for that year upon the entire claim. If, under the decisions of the land department, and the tendency of the adjudications of the courts, \$500 in work and improvements on any part of a 160 acre claim, or any one of a number of contiguous claims, is sufficient to entitle applicants to a patent for the whole of such ground or claims, then, by parity of reason, it would seem that \$100 in work or improvements expended or made upon such 160 acre claim in any one year would save it from forfeiture. Such seems to be the view taken by the land-offices, and is in accordance with the customs, rules, and regulations of miners in this jurisdiction. But in this case a forfeiture was not pleaded by appellant in its answer, although the court below permitted evidence of the amount of work done on said claim for the year 1891. There is no evidence of a re-entry or relocation by any one on account of failure to do the required work by plaintiffs on said ground; nor does the defendant connect itself with any

outstanding title adverse to plaintiff, or plead any license or warrant to enter upon the ground in controversy. We do not find any thing in the record to support the plea of forfeiture.

The appellant contends that in this case, if it were liable for actual damages, the court below erred in rendering judgment for treble damages. This suit was instituted for damages for willful and malicious trespass; but respondents contend that, notwithstanding the complaint charges willful and malicious trespass, they are nevertheless entitled to treble damages, under section 363 of the Code of Civil Procedure. The respondents contend that it was not necessary, under said section, to allege or prove malice, wantonness, or evil design, etc.

In Endlich on the Interpretation of Statutes, section 129, the author, commenting on similar statutes, says: "Similarly, statutes giving punitive, double, or treble damages against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, are held confined to cases where some element of willfulness, wantonness, carelessness, or evil design enters into the act."

In *Cohn v. Neeves*, 40 Wis. 393, the court, in a case involving ⁹⁴ the construction of a statute similar to the one under consideration here, says: "The important question arising upon the various exceptions taken by defendants is: Does the statute give the treble damages when the conversion is merely a technical conversion in law, as in the case before us, or was it only intended to apply to cases where some ingredient of willfulness, wantonness, or evil design enters into the act? According to the view of the circuit judge the statute applies to every case of the conversion of logs, timber, or lumber floating in any of the waters of this state, or lying on the banks or shores of such waters, or on any island where the same may have drifted, and gives treble damages as the measure of recovery. It seems to us that this is an unreasonable and unsound construction of the provision. True, the language used is general, and, if literally interpreted, would include any conversion. But, says an acknowledged authority on this subject, in interpreting a statute it is not always a safe rule, or a true line of construction, to decide according to the strict letter of the act, but courts will rather consider what is its fair meaning, and will expound it differently from the latter, in order to preserve the intent. *Qui*

hæret in litera, hæret in cortice: Broom's Legal Maxims, 536. Observing this rule of interpretation, looking at the object and purpose of the statute, we cannot think it was intended to apply to every conversion of this kind of property, situated or found as described, without regard to the question whether the conversion was wanton and willful or not. It is needless to observe that the law is highly penal in its character. By way of punishment it subjects the wrongdoer, in certain cases, to an extraordinary liability for the property of another appropriated to his use. In some cases the conversion may be merely a technical one in law, arising from accident, mistake, or even carelessness, without any evil design, and where the damages recoverable at common law afford an adequate compensation to the party injured." The same conclusion is arrived at, and the same construction placed upon a similar statute, in *Wallace v. Finch*, 24 Mich. 256.

In *Kramer v. Goodlander*, 98 Pa. St. 353, construing a statute almost identical with ours, the court say: "Its [the statute's] object is the prevention of willful or careless cutting of another's timber, by at once punishing the wrongdoer, and amply compensating the owner."

In the case at bar the evidence shows that the land in controversy was located out in the wilderness, far away from human habitation. The plaintiffs had to cut a trail through the timber to get to it. The defendant, coming to the land from another direction, had to cut a trail also. The defendant found but little evidence that any of the land in the vicinity had ever been claimed by any person for any purpose, except the blazing of four or five trees, and a small discovery shaft on the ground in controversy, as the work of plaintiffs. There was nothing to indicate that anybody actually asserted ownership or dominion over any part of the country thereabout. The circumstances attending the trespass complained of here are vastly different from a case where a person cuts down a shade tree in front of another's house or lot, or enters another's close and damages trees or timber therein, when all the evidences of ownership in another are present. These are the acts and trespasses we think are intended to be denounced and punished by our statute. The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant. We therefore think that the evidence did not justify the render-

ing of judgment for treble damages against defendant in this case.

It is ordered that the judgment of the court below be modified, by rendering judgment in favor of plaintiffs against the defendant, for the amount of actual damages found by the jury, and in other respects the judgment is affirmed as modified.

HARWOOD, J., concurs. —

TRESPASS.—DAMAGES FOR CUTTING AND CARRYING AWAY TIMBER: See the extended notes to *Blaen Aron Coal Co. v. McCulloh*, 43 Am. Rep. 563, and *Coal Creek Min. etc. Co. v. Moses*, 54 Am. Rep. 422.

MINING LOCATION—LABOR.—When a mining rule makes work upon one set of claims work upon contiguous claims by the same owner the amount required to hold one set will hold all: *Bradley v. Lee*, 38 Cal. 366.

WHITTAKER v. HELENA.

[14 MONTANA, 124.]

NEGLIGENCE—CONTRIBUTORY OF ONE PERSON, WHEN IMPUTED TO ANOTHER.

A person who voluntarily takes passage in a vehicle, driven and managed by another, assumes the risk of the care and skill of the latter, and if an injury results to which the negligence of the latter contributed, cannot recover therefor.

Sydney H. McIntire, for the appellant.

F. Adkinson and John S. Miller, for the respondent.

127 PEMBERTON, C. J. This is an action to recover damages for personal injuries sustained by plaintiff by being thrown from a buggy in the streets of said defendant city. Among other things, the complaint alleges, substantially, that on the thirtieth day of August, 1890, and for some days prior thereto, the defendant wrongfully and negligently authorized and permitted a certain show to be maintained and conducted in a tent, or canvas-covered wagon, on Grand street, in said city; that said show was such an obstruction as to render travel along said street unsafe and dangerous, and was of such character as to frighten gentle and well-broken horses driven along said street; that on said thirtieth day of August plaintiff was riding in a buggy drawn by a safe and gentle horse, which was being driven with due care and caution along said street, when said horse, without any fault or negligence of plaintiff, became frightened at said

show tent or wagon, became unmanageable, and ran away, upsetting said buggy and throwing plaintiff to the ground with great force, whereby he was greatly injured and damaged; that plaintiff, in the lawful transaction of his business had necessarily to pass along said street. The allegations of the complaint are denied by the answer. The case was tried in the court below with a jury, and resulted in a verdict for the plaintiff for one thousand dollars, for which sum judgment was rendered. Defendant moved for new trial, which was denied. This appeal is prosecuted from the judgment and order denying the motion for new trial.

The evidence clearly shows that the plaintiff, at the time of the accident set forth in his complaint, was riding with one James S. Dunn, who owned the buggy and horse, and was driving the same. Dunn, it seems, was on his way to lunch, and invited plaintiff, who lived in the same part of the city, to ride with him, as it seems he did almost every day prior thereto. The evidence does not show that plaintiff knew of the existence of the alleged obstruction to travel on the street, but Dunn swears that he knew of it. Dunn was, at the time, ¹²⁸ an alderman of the city. It appears from that evidence the accident to plaintiff occurred at about 1 o'clock P. M. on the thirtieth day of August. At 12 M. of said day there was a meeting of the city council of said city. Dunn swears that he was at that meeting, and in an earnest and excited manner called the attention of the council to the fact that this show in the tent or wagon was located and doing business on Grand street, and also called the attention of the council to its dangerous character; that the mayor stated that he would see to its removal at once; that thereupon the council adjourned, and that he went immediately to Edwards street, got his horse and buggy, drove to Main street, took the plaintiff into his buggy, as he was in the habit of doing every day, and started up Grand street, and, in attempting to pass this tent or wagon, the accident happened which resulted in plaintiff's being injured and damaged; that the tent or wagon was on one side of the street, and a pile of rock the city was using in work on the street was on the opposite side of Grand street from the tent or wagon; that, in attempting to pass between the tent or wagon and said pile of rock, the horse became frightened, and ran the buggy over the rock pile, turning the buggy over, throwing the occupants out, and inflicting upon the plaintiff

the injuries for which he sues in this action. This evidence of Dunn is in no way questioned. That he knew the obstructed and dangerous condition of Grand street (if it was in a dangerous and obstructed condition) when he drove upon it is beyond dispute. Under this state of facts could Dunn recover if he were prosecuting this suit against the city? If he could not recover, can this plaintiff, who was voluntarily riding with him in his buggy, recover? Was Dunn guilty of such contributory negligence as would defeat his right to recovery, when he drove upon the street, knowing the condition thereof? If so, was his negligence imputable to the plaintiff, so as to defeat a recovery on his part?

In *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, a case involving the question under discussion, the court says: "One voluntarily in a private conveyance voluntarily trusts his personal safety in the conveyance to the person in control of it. Voluntary entrance into a private conveyance adopts ¹²⁹ the conveyance, for the time being, as one's own, and assumes the risk of the skill and care of the person guiding it. *Pro hac vice*, the master of a private yacht, or the driver of a private carriage, is accepted as agent by every person voluntarily committing himself to it. When *paterfamilias* drives his wife and child in his own vehicle he is surely their agent in driving them, to charge them with his negligence. It is difficult to perceive on what principle he is less the agent of one who accepts his or their invitation to ride with them. There is a personal trust in such cases, which implies an agency. So, several persons voluntarily associating themselves to travel together in one conveyance, not only put a personal trust in the skill and care of that one of them whom they trust with the direction and control of the conveyance, but appear to put a personal trust each in the discretion of each against negligence affecting the common safety. One enters a public conveyance in some sort of moral necessity. One generally enters a private conveyance of free choice, voluntarily trusting to its sufficiency and safety. It appears absurd to hold that one voluntarily choosing to ride in a private conveyance trusts to the sufficiency of the highway; to the care and skill exercised in all other vehicles upon it; to the care and skill governing trains at railroad crossings; to the care and skill of every thing except that which is most immediately important to himself, and trusts nothing to the sufficiency of the very vehicle in

which he voluntarily travels; nothing to the care and skill of the person in charge of it. His voluntary entrance is an act of faith in the driver; by implication of law, he accepts the driver as his agent to drive him. In the absence of express adjudication, the general rules of implied agency appear to sanction this view. . . . A woman may, and should, refuse to ride with a man if she dislike or distrust the man, or his horse, or his carriage. But, if she voluntarily accept his invitation to ride, the man may, indeed, become liable to her for gross negligence; but, as to third persons, the man is her agent to drive her—she takes man, and horse, and carriage for the jaunt; for better, for worse.” *Otis v. Town of Janesville*, 47 Wis. 422, is to the same effect.

In *Lake Shore etc. R. R. Co. v. Miller*, 25 Mich. 274, a case ¹²⁰ involving the question whether or not the negligence of the driver of a private team was imputable to one who was riding voluntarily with the driver, Mr. Chief Justice Christiancy, speaking for the court, says: “The materiality of this question must depend upon another—whether the plaintiff’s own negligence or that of Eldridge, who was driving the team, contributed to the injury, within the meaning of the generally settled rule upon this subject; for, as she was riding with Eldridge, the owner and driver of the team, any negligence of Eldridge equally affects her rights in this suit, as was properly held by the court.”

These authorities all hold that if the negligence of the party injured, or of his driver, which is imputed to him, materially contributed to the injuries, he cannot recover, although the party complained of has not been free from negligence. In the case at bar it seems clear that Dunn was not only guilty of contributory negligence, but that he was reckless in driving into a street which he swears he knew to be dangerously obstructed. His negligence must be held as imputable to plaintiff. If Dunn could not recover under the facts and circumstances of the case, neither could the plaintiff, although the defendant may have been guilty of negligence on its part, which it is not necessary in this case to determine. There are other assignments of error in the record, but we do not consider it necessary to consider them, as we think the treatment above decisive of the case. The court below recognized the law as stated above as applicable to this case, and so declared it to the jury in the instructions given. But the verdict seems to us to have been rendered in disregard of the

law as given by the court, as well as of the evidence in the case. We think the court should have granted, for these reasons, the motion of the defendant for a new trial.

The judgment is therefore reversed, and cause remanded for new trial.

HARWOOD, J., concurs.

NEGLECT OF ONE PERSON WHEN IMPUTED TO ANOTHER: See *Mullen v. City of Owosso*, 100 Mich. 103; *ante*, p. 436, and note.

BRAITHWAITE v. HARVEY.

[14 MONTANA, 208.]

A JUDGMENT AGAINST AN ADMINISTRATOR OF A DECEASED PERSON in one state is no evidence of debt in a subsequent action by the same person in another state against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased.

JUDGMENTS—PARTIES.—AN ADMINISTRATOR UNDER A GRANT OF ADMINISTRATION IN ONE STATE is not privy in law nor in estate to an administration in another state.

JUDGMENT—PARTIES.—AN ADMINISTRATOR has no authority to act for or bind the estate outside of the jurisdiction of the state of his appointment, and therefore cannot be bound by a judgment entered against an administrator of the same estate in another state on the ground that he participated in the defense of the action in the other state.

STATUTE OF LIMITATIONS—NEW PROMISE.—A letter from an alleged debtor stating that if he does not hear from the creditor soon he will tender the amount due, and that whatever is due is ready whenever he can safely pay either to the person to whom the letter is directed, or to another person named therein, does not constitute a new promise sufficient to remove the bar of the statute of limitations, because it shows that there was a dispute as to what was due and to whom it was payable, and that the alleged debtor was not willing to pay until these two questions were settled.

George W. Newton and Middleton & Light, for the appellant.

Strevell & Porter, for the respondent.

215 PEMBERTON, C. J. Through this action plaintiff seeks to recover judgment against Phillip Harvey, administrator of Joseph Leighton, deceased, on a demand for the payment of five thousand five hundred and thirty-five dollars and ninety-three cents, and interest, arising on a contract hereinafter referred to. The claim was presented to, and disal-

lowed by, the administrator of the decedent. This action was then brought in the district court thereon. The questions involved in this appeal arise on the action of the trial court in striking from the complaint portions thereof, on motion of defendant, and thereafter sustaining demurrer interposed to the complaint, on the ground that it shows no sufficient facts to constitute a cause of action, because it appears on the face thereof that the cause of action is barred by the statute of limitations.

It appears that in 1880 a contract for the transportation of certain freight from Bismarck, Dakota, via the Missouri river by boat to Fort Buford, was made between plaintiff, as transporter, and decedent and several others, as consignors. The contract was made and evidenced by the following letter:

"BISMARCK, D. T., Nov. 3, 1880.

"Capt. Wm. Braithwaite, Steamer 'Eclipse.'

"DEAR SIR: On your accepting this proposition, will agree to give you one dollar and seventy-five cents (\$1.75) per one hundred pounds, from Bismarck to Fort Buford, on freight up to the amount of one hundred tons, and on all over and above one hundred tons, one dollar and fifty cents (\$1.50) per one hundred pounds. Receipts to be equal to 100 tons to Buford. Freight to be paid on receipt of bills of lading by draft at ten days' sight on Jos. Leighton, St. Paul.

"Yours, etc. J. C. BARR,

"Agt. for H. C. Akin, Jos. Leighton & Benton Line."

216 The freight mentioned was transported, as appears, with some delays and other incidents in relation to the fulfillment of the contract, which are not necessary to recite in this determination, and thereby the claim for the enforcement of which this suit is prosecuted accrued in said year.

The complaint not only pleads this contract, but alleges that on the twelfth day of November, 1887, this plaintiff instituted a suit in the district court of the then territory of Dakota, in and for the county of Burleigh, now in the state of North Dakota, against Joseph Leighton, and several other parties alleged to be interested with him, to recover the amount alleged to be due plaintiff thereon. This suit was by attachment, and the property of Joseph Leighton in said territory at the time was seized thereunder. All the proceedings in said suit, and the history thereof, are set out in the complaint, or referred to as exhibits, and made part

thereof, including the judgment of the district court, and the appeal therefrom to the supreme court of said territory, and the judgment of said supreme court. In these allegations the death of Joseph Leighton is shown to have occurred on the second day of September, 1888, at Custer county, in the state of Montana, where he resided. Joseph Leighton was never personally served with process in the Dakota suit. After his death one Harvey Harris was appointed administrator of his estate in Dakota territory, and appeared as such, and defended such suit. It seems, too, that, pending said suit in Dakota, certain other parties were permitted to intervene therein. These matters are particularly set out in paragraphs 17, 19, 20, 21, 22, and 23 of the complaint, and are as follows:

“17. That thereafter, on or about the eleventh day of February, 1889, one Harvey Harris, of said Burleigh county, was duly appointed administrator of the estate of said Joseph Leighton, deceased, by the then probate court of said Burleigh county, territory of Dakota, the same being a court of general jurisdiction in probate matters, and having and possessing jurisdiction for the appointment of the said Harris, as hereinbefore shown; that, after qualifying under said appointment, in accordance with the laws of the then territory of Dakota, now state of North Dakota, the said Harris entered ²¹⁷ upon the discharge of his duties as such administrator of the estate of said Joseph Leighton, deceased, in said Burleigh county and territory, and continued in the discharge of said duties as such administrator, until the said estate in said Burleigh county, then territory of Dakota, now state of North Dakota, was fully administered.

“19. That thereafter, on or about the fifteenth day of March, 1889, by stipulation, a copy of which is hereto attached and referred to, and found upon page 46 of Exhibit ‘1,’ and by an order of said district court, in which said action was pending, a copy of which order is hereto attached and referred to, and found upon pages 47 and 48 of Exhibit ‘1,’ hereto attached, said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, came into said court, and entered his appearance in said action, and as a party defendant therein, and as the administrator and successor of the said Joseph Leighton, deceased, and that said action was revived and continued against said Harris, as said administrator, and thereafter proceeded with said Harris as said

administrator of said Joseph Leighton, deceased, as a party defendant.

"20. That on or about the twenty-third day of February, 1889, William Rea and George F. Robinson, copartners as Robinson, Rea & Co., J. C. Kay, and Woodruff McKnight, copartners as Kay, McKnight & Co., A. W. Cadman as A. W. Cadman & Co., and Joseph McC. Biggert, applied to said court to intervene in said action, and by said court were permitted so to do, and so did, and thereafter said action proceeded with said intervenors as parties thereto; and that a copy of the order of said court permitting said intervention is hereto attached and referred to, and found on pages 51 to 62 of Exhibit '1,' hereto attached; and said intervenors served and filed their complaint in intervention in said action, and a copy of the same is hereto attached, and referred to and found upon pages 53 to 60 of said Exhibit '1,' hereto attached, and that thereafter, on or about the twenty-second day of March, 1889, the plaintiff served and filed his answer to said intervenors' complaint, and a copy of the same is hereto attached and referred to, and made a part hereof, and found upon pages 61 to 66 of Exhibit '1,' hereto attached.

"21. That the defendant herein, as the general administrator of the estate of said Joseph Leighton, deceased, immediately upon his appointment and qualification as such, as hereinbefore shown, was notified of the pendency of said action in said Burleigh county, territory of Dakota, now state of North Dakota, and of the plaintiff's claim therein, and thereafter said action proceeded to trial in said district court, and the defendant herein the same contested and defended in the name of said Harvey Harris as administrator, as hereinbefore shown, and therefore invoked the jurisdiction and determination of said court, employed counsel, produced evidence, and the issues of said contest and defense prosecuted to a final determination; and such proceedings were had in said action from time to time by the direction and co-operation of the defendant herein, that on the twenty-eighth day of August, 1891, final judgment was rendered and entered in said action, in favor of the plaintiff and the said intervenors, and against the defendant Harvey Harris, as administrator of the estate of said Joseph Leighton, deceased, to be paid in due course of administration, and the other defendants in said action, except Akin, for the sum of seven thousand three hundred and thirty-five dollars and eighty-five cents, and for

certain costs of said action, amounting to the sum of two hundred and fifty dollars and thirty-six cents, and that said judgment is in full force and unreversed, and that a copy thereof is hereto attached, and referred to as, and made a part of, this allegation, and found upon pages 78 and 89 of Exhibit '1,' hereto attached.

"22. That the said Joseph Leighton, in his lifetime, in writing, signed by him, the said Joseph Leighton, and on the twenty-first day of July, 1888, acknowledged the said indebtedness under the said contract for the work, labor, and service performed under and by virtue of said contract of affreightment by this plaintiff, as aforesaid, which acknowledgment was in words and figures as follows, that is to say:

" 'Joseph Leighton,	E. B. Weirick,
" 'President.	Cashier.
" 'W. B. Jordan,	H. B. Wiley,
" 'Vice Pres't.	Asst. Cashier.
" '2,752	FIRST NATIONAL BANK.
" 'Capital	\$50,000
" 'Surplus and undivided profits.....	65,000
" ' MILES CITY, Montana, 7/21, 1888.	

219 " 'J. D. Biggert, Pittsburg,

" ' DEAR SIR: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last seven years, whenever I can safely pay either you or Braithwaite.

" ' Yours truly,
 " ' J. LEIGHTON.'

" That the sum owing to plaintiff, as shown by the allegations hereinbefore contained, was the amount, and not otherwise, referred to in said letter; and the Braithwaite mentioned therein is this plaintiff, and none other; and the said J. D. Biggert, claiming to act and acting on behalf of said intervenors, was not a stranger to the transaction. That on divers and sundry times the said Joseph Leighton acknowledged said indebtedness, to wit, on the twenty-seventh day of June, 1888, on the twenty-second day of July, 1888, and on the fifth day of August, 1888, as will more fully appear from pages 74 to 77 of Exhibit '1,' hereto annexed, and made a part hereof. That again, on the first day of August, 1888, the said Joseph Leighton, by one George T. Webster, his

attorney, duly authorized so to do, acknowledged under oath the making of the contract of affreightment hereinbefore mentioned, and the voyage, as will more fully appear from pages 42 to 45 of said Exhibit '1,' hereto annexed, and made and referred to as a part hereof.

"23. That there has been paid plaintiff, and applied in liquidation of a part of the amount so due plaintiff, as aforesaid, from the said Harvey Harris, as administrator of the estate of Joseph Leighton, deceased, the sum of four hundred and thirteen and 92-100 (413.92) dollars, said payment being made on the thirty-first day of March, 1892. That therefore, and the twenty-eighth day of November, 1891, there was paid on account of said indebtedness owing to this plaintiff the further sum of two thousand dollars (\$2,000), which sum was paid for and in behalf of the said Joseph Leighton by Kelly & Jordan, who had heretofore obligated themselves to pay the same for and in behalf of the said Joseph Leighton. And that the estate of the said deceased in the territory of Dakota, now state of North Dakota, has been fully administered upon, settled, and exhausted, and said administrator's final accounts ²²⁰ presented to the county court in and for said Burleigh county, state of North Dakota, the same having exclusive jurisdiction therein, and by said court passed, allowed, and approved, and said administrator discharged from said trust, and that a copy of the order of said county court passing, allowing, and approving said final account is hereto attached, and referred to and made a part hereof, and found on pages 92 to 94 of Exhibit '1,' hereto attached."

On motion of the defendant the court struck these paragraphs from the complaint, on the ground that they were irrelevant and redundant. This action of the court is assigned as error. To determine this question it is necessary to determine the force and effect of a judgment against an administrator in one state against an administrator of the same estate in another state.

In *Johnson v. Powers*, 139 U. S. 156, this subject is thoroughly discussed, and the authorities are collected and cited. In this case Mr. Justice Gray, delivering the opinion of the court, says:

"A judgment *in rem* binds only the property within the control of the court which rendered it, and a judgment *in*

personam binds only the parties to that judgment and those in privity with them.

"A judgment recovered against the administrator of a deceased person in one state is no evidence of debt in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person appointed there, or against any other person having assets of the deceased": *Aspden v. Nixon*, 4 How. 467; *Stacy v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 How. 16; *Low v. Bartlett*, 8 Allen, 259.

In *Stacy v. Thrasher*, 6 How. 44, in which a judgment, recovered in one state against an administrator appointed in that state, upon an alleged debt of the intestate, was held to be incompetent evidence of the debt in a suit brought by the same plaintiff in the circuit court of the United States held within another state against an administrator there appointed of the same intestate, the reasons given by Mr. Justice Grier have so strong a bearing on the case before us, and on the argument of the appellant, as to be worth quoting from:

221 "The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situate. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and therefore bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction": *Stacy v. Thrasher*, 6 How. 53.

In answering the objection that to apply these principles to a judgment obtained in another state of the union would be to deny it the faith and credit, and the effect, to which it was entitled by the constitution and laws of the United States, he observed that it was evidence, and conclusive by way of estoppel, only between the same parties, or their privies, or on the same subject matter when the proceeding was *in rem*; and that the parties to the judgments in question were not the same; neither were their privies, in blood, in law, or by estate; and proceeded as follows:

"An administrator under grant of administration in one state stands in none of these relations to an administrator in another. Each is privy to the testator, and would be estopped by a judgment against him; but they have no privity

with each other, in law or in estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is accountable to the ordinary from whom he receives his authority. Nor does the one come by succession to the other into the trust of the same property, encumbered by the same debts": *Stacy v. Thrasher*, 6 How. 59, 60.

"It is for those who assert this privity to show wherein it lies, and the argument for it seems to be this: That the judgment against the administrator is against the estate of the intestate, and that his estate, wheresoever situate, is liable to pay his debts. Therefore the plaintiff, having once established his claim against the estate by the judgment of a court, should not be called on to make proof of it again. This argument assumes that the judgment is *in rem*, and not *in personam*, or that the estate has a sort of corporate entity and unity. But ²²² that is not true, either in fact or in legal construction. The judgment is against the person of the administrator, that he shall pay the debt of the intestate out of the funds committed to his care. If there be another administrator in another state, liable to pay the same debt, he may be subjected to a like judgment upon the same demand, but the assets in his hands cannot be affected by a judgment to which he is personally a stranger. The laws and courts of a state can only affect persons and things within their jurisdiction. Consequently, both as to the administrator and the property confided to him, a judgment in another state is *res inter alios acta*. It cannot even be *prima facie* evidence of a debt, for, if it have any effect at all, it must be as a judgment, and operate by way of estoppel": *Stacy v. Thrasher*, 6 How. 60, 61.

In *Low v. Bartlett*, 8 Allen, 259, 266, following the decisions of this court, it was held that a judgment allowing a claim against the estate of a deceased person in Vermont, under statutes similar to those of Michigan, was not competent evidence of debt in a suit in equity brought in Massachusetts by the same plaintiff against an executor appointed there, and against legatees who had received money from him; the court saying: "The judgment in Vermont was in no sense a judgment against them, nor against the property which they had received from the executor."

If the judgment recovered in Dakota against the administrator there is of no binding force and effect, not even effec-

tual as evidence of a debt, against the administrator in this state, as is held by the authority just quoted, then the pleading of the same, as is done in this case, could subserve no valuable purpose, and it cannot be properly contended that the court erred in striking the same, and all reference thereto, from the complaint. Appellant contends that it was necessary to plead such judgment and proceedings in order to show that the demand sued on here had been given credit for the amount realized under the Dakota judgment. We think this position untenable. Such credit could have been given in any suit on the demand in litigation.

The appellant further contends that it was necessary to plead the Dakota judgment and proceedings, in order to show that ²²² the Montana administrator, the defendant here, is estopped from disputing the claim sued on by reason of his having taken part, as alleged in paragraph 21, stricken from the complaint, in defending said Dakota suit in the name of Harvey Harris, administrator there. We think this contention cannot be maintained. There was no privity between these two administrators. This defendant had no authority to act or bind the estate outside of the jurisdiction of his own state or appointment: See *Johnson v. Powers*, 139 U. S. 156, and authorities cited therein; 1 Wörner's American Law of Administration, sec. 160, p. 362.

Appellant contends that, whatever force and effect the court might give the Dakota judgment and proceedings set out in the complaint, and the action of the court therein, still he has a cause of action independent thereof, by reason of the alleged new promise in writing of Leighton in his lifetime, pleaded in paragraph 22 of the complaint, which was stricken out by the court. After striking out said parts of the complaint the court sustained defendant's demurrer thereto on the ground that the demand sued on was barred by the statute of limitations. This action of the court is especially attacked and complained of by appellant, as he says the court, by striking out paragraph 22 of the complaint, left the same demurrable, as said paragraph set up, as claimed, a new promise, made by Leighton in his lifetime, to pay the demand sued on. While, perhaps, it would have been more appropriate to attack this particular paragraph of the complaint by demurrer, yet whether prejudicial error was committed by the court in its action we will consider later on. Does paragraph 22 of the complaint contain and plead such a new promise to

pay the demand sued on as will relieve it from the bar of the statute of limitations? It is conceded that the demand is barred unless the bar is removed by the new promise of Leighton in his lifetime, set out in said paragraph 22. We will consider this question as if said paragraph had not been stricken from the complaint. The written new promise of Leighton relied on to remove the bar of the statute of limitations in this case is as follows:

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"MILES CITY, Montana, 7/21, 1888.

"*J. D. Biggert, Pittsburg,*

"DEAR SIR: Nothing from you yet. If I don't hear soon, I will go to Bismarck, and tender amt. due, as I don't want to be bothered any more. Whatever is due is ready, as it has been for the last 7 years, whenever I can safely pay either you or Braithwaite.

Yours truly,

"J. LEIGHTON."

The appellant relies on two other written instruments, signed by said Leighton, to relieve this demand from the bar of said statute. These instruments are as follows:

"MILES CITY, Montana, 6/27, 1888.

"*John Biggert, Pittsburg,*

"DEAR SIR: Have just returned, and have been looking over matters. I am not satisfied about the settlement of *Eclipse* trip. Please write me your understanding of it. Also, if I settle with your folks, if they will see me clear of Braithwaite, &c. Write me at once.

Your truly,

"J. LEIGHTON."

"MILES CITY, Montana, 7/22, 1888.

"*J. D. Biggert, Pittsburg,*

"DEAR SIR: Yours, with check, at hand. I am anxious to see Joe better. He came out and figured up books, and saw that we had a loss for 1, and went away satisfied, but we will write him after I get his letter. I cannot wait long for your decision. You know I am very ill, and I must have this thing off my hands. I want to help you in the matter, but the suit has got to be attended to.

"Very truly,

"J. LEIGHTON.

"Why don't you write me about your letter of April, '82"?

These last two instruments are referred to as exhibits, and the first instrument is set out in full in said paragraph 22. Said first written instrument or letter is especially relied on

by appellant as constituting such an acknowledgment of the demand sued on, and new promise to pay the same, as to take the debt out of the operation of the statute of limitations.

In *Bell v. Morrison*, 1 Pet. 352, a case involving the doctrine under discussion, Mr. Justice Story, speaking for the ²²⁵ court, says: "To remove the bar of the statute of limitations by a new promise it must be determinate and unequivocal; and, if the new promise is to be raised by implication of law from an acknowledgment, there must be an unqualified acknowledgment of a subsisting debt which the party is liable and willing to pay."

In *Biddell v. Brizzolara*, 56 Cal. 382, the court say: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances which repel the promise or intention to pay; if the expressions be equivocal, vague, and undeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to a jury as evidence of a new promise to revive the cause of action: Mr. Justice Story, *Bell v. Morrison*, 1 Pet. 362." "An acknowledgment of the debt to take the case out of the statute of limitations must be clear and unambiguous, and must recognize and be directed to the particular debt and amount to an unqualified admission that it is due and unpaid": 5 Gen. Dig. U. S., sec. 526, p. 1399, and authorities there cited.

In *McCormick v. Brown*, 36 Cal. 185, 95 Am. Dec. 170, the court say: "The acknowledgment must be a direct, distinct, unqualified admission of the debt which the party is liable and willing to pay."

We think it cannot be contended that the two writings claimed to be acknowledgments and new promises, dated respectively 6/27, 1888, and 7/22, 1888, and set out above, contain any such acknowledgments of this debt, or new promise to pay the same, as to relieve the demand sued on from the bar of the statute. The instrument dated 7/22, 1888, says nothing about this demand. The instrument dated 6/27, 1888, shows that Leighton is not satisfied about the settlement of the *Eclipse* trip, and asks, "If I [Leighton] settle with your folks, if they will see me clear of Braith-

waite," etc. If there is any promise in this, is it not conditional? This certainly does ²²⁶ not come within the requirements to take it out of the operation of the statute, even if the instruments were otherwise definite and certain, in which respect it seems fatally defective. Now, as to the first instrument or letter of Leighton, chiefly relied on to take this case out of the statute of limitations, this letter, like the others, is written to one J. D. Biggert, at Pittsburg. In this letter Leighton seems to complain of Biggert's delay. He says if he does not hear soon, he will go to Bismarck, and tender amount due, as he does not want to be bothered any more. Then he says, "Whatever is due is ready, as it has been for 7 years, whenever I can safely pay either you or Braithwaite." Now, what are the legitimate inferences to be drawn from this letter and the others? 1. That Leighton was ill, and was anxious to settle this matter in his lifetime; 2. That he was willing, and had been for seven years, to pay whatever was due from him, when the amount could be ascertained, and he should know to whom he could safely pay such amount. It is very evident that there was a dispute as to what was due, and to whom it was payable. Leighton seemed anxious to pay when these two important matters were settled. His willingness to pay was evidently conditioned upon the ascertainment of the amount due, and when he was made secure in paying either to the parties represented by Biggert or to Braithwaite. It does not appear that either of these things was ever done, or that Leighton's letter and terms therein stated were ever accepted or acted upon in any manner by plaintiff or any other party connected with this matter. These conditions should have been shown to have been performed by plaintiff before he seeks the benefit of the alleged new promise to pay: *Bell v. Morrison*, 1 Pet. 351. This is not shown to have been done. But plaintiff seems to have disregarded the terms, conditions, and overtures of settlement contained in this alleged new promise, and now, after the death of Leighton, seeks to avail himself of the benefits thereof, as if such conditions were immaterial. We think no other conclusion can be fairly reached from a proper construction of all these letters and alleged new promises to pay. In none of these letters is there an unconditional, definite, certain, and unqualified acknowledgment of this demand, or any certain ²²⁷ demand and promise to pay the same. We are therefore of the opinion that these written

instruments or letters of Leighton are insufficient to remove the bar of the statute of limitations. So holding, we see no error in the action of the court in holding the complaint bad on demurrer, or that any substantial right of appellant was prejudiced by striking said paragraph 22 from the complaint, as, in our view, the complaint did not, in any event, state facts sufficient to authorize a recovery, for the reason that the demand sued on is barred by the statute of this state.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

HARWOOD and DE WITT, JJ., concur.

EXECUTORS AND ADMINISTRATORS — EXTRATERRITORIAL EFFECT OF APPOINTMENT OF.—Letters of administration have no legal force or effect beyond the territorial limits of the state in which they are granted: *Smith v. Howard*, 86 Me. 203; 41 Am. St. Rep. 537, and note, with the cases collected, discussing the various questions as to foreign executors and administrators. These questions will be found discussed at length in the extended notes to *Ela v. Edwards*, 90 Am. Dec. 175; *Vaughn v. Barret*, 26 Am. Dec. 309, and *Doolittle v. Lewis*, 11 Am. Dec. 394.

LIMITATIONS OF ACTIONS—NEW PROMISE.—A new promise is implied from a general unqualified acknowledgment of a debt: *Custy v. Donlan*, 159 Mass. 245; 38 Am. St. Rep. 419, and note. See, also, the notes to *Manchester v. Braedner*, 1 Am. St. Rep. 831; *Spangler v. Spangler*, 9 Am. St. Rep. 116; and *State v. Finn*, 14 Am. St. Rep. 660.

McCULLOH v. PRIOR.

[14 MONTANA, 820.]

A CONVEYANCE OF ALL THE LANDS, TENEMENTS, HEREDITAMENTS, APPURTENANCES OF EVERY DESCRIPTION belonging to the granters, or either of them, or in which they have, or either of them has, any interest wherever such property, or any part thereof, may be situate, is not void for want of description, and transfers their title to any and all lands in which they have any interest.

CONVEYANCE.—AN EXCEPTION FROM A CONVEYANCE OF ALL PROPERTY OF THE GRANTORS, OR EITHER OF THEM, EXEMPT FROM EXECUTION by the laws of the state wherein the conveyance is made, does not render it void for uncertainty. That is certain which may be made certain.

Henry C. Smith, for the appellant.

H. G. McIntire, for the respondent.

321 DE WITT, J. This is an action in the nature of ejectment, in which plaintiff recovered judgment. A motion for

a new trial was denied. From this order and from the judgment defendant appeals.

Respondent contends that the order denying the new trial cannot now be reviewed, because the notice of motion was not filed in time. But we may pass this contention, because the only point made upon the motion for a new trial is also properly preserved in a bill of exceptions; thus becoming part of the judgment-roll, and reviewable on the appeal from the judgment. That point is as follows: Plaintiff relied for title to the premises in controversy upon a deed of general assignment for the benefit of creditors made by Bennet Price, defendant, to S. E. Atkinson, as his assignee, said Atkinson ²²² afterward conveying to plaintiff. When the deed of assignment was offered in evidence as part of plaintiff's chain of title defendant objected to it upon two grounds. His objections were overruled. He excepted, and now urges error in this respect.

The first objection was that, in the deed of assignment, the description of the property was insufficient to pass the title to real estate. The instrument was executed by this defendant and J. H. Jurgens and wife. The granting and descriptive portion of the deed of assignment is as follows: "Said parties have," etc., "and by these presents do grant, bargain, sell, assign, transfer, and set over to," etc., "all and singular, the lands, tenements, hereditaments, and appurtenances, goods, etc. [describing personal property], of every description, belonging to the said parties of the first part, or either of them, or in which they, or either of them, have any right or interest . . . and wheresoever said property, or any part thereof, may be situated."

This description, appellant contends, is insufficient, as being too general. He does not cite us to any authorities supporting his contention. The description is of all the lands of this appellant, of every description, belonging to him, wherever situated.

The United States supreme court said in *Wilson v. Boyce*, 92 U. S. 325: "The question is, Does the word 'property' in the statute create a valid lien on these lands. The generality of its language forms no objection to the validity of the mortgage. A deed 'of all my estate' is sufficient. So, a deed 'of all my lands, wherever situated,' is good to pass title: *Jackson v. De Lancey*, 4 Cow. 427; *Pond v. Bergh*, 10 Paige, 140; 1 Atkinson on Conveyancing, 2. A mortgage

‘of all my property,’ like the one we are considering, is sufficient to transfer title.”

We also cite as follows from *Pettigrew v. Dobbelaar*, 63 Cal. 396: “Appellant also urges that the second deed from Harvey to Lacey contains no description, and is void. The descriptive clause is, ‘All lands and real estate belonging to the said party of the first part, wherever the same may be situated, together,’ etc. If the lands in controversy belonged to Harvey they ³²³ passed by the deed last mentioned: *Lick v. O'Donnell*, 3 Cal. 59; 58 Am. Dec. 388.”

In the case at bar there is no question but the lands belonged to Price when the assignment was made. The contention in this case is between assignor and assignee's grantee. There is no claim that this general description attempted to cover any fraud, or was likely to work any fraud. There is no reference to any schedule to limit the general description. Under all these circumstances there can be no doubt that the description of the premises was sufficient: *Frey v. Clifford*, 44 Cal. 343; *Brown v. Warren*, 16 Nev. 237; *Prettyman v. Walston*, 34 Ill. 175; *Kellogg v. Slawson*, 15 Barb. 58; *Harmon v. James*, 7 Smedes & M. 111; 45 Am. Dec. 296; *Strong v. Lynn*, 38 Minn. 315; *Jackson v. De Lancey*, 11 Johns. 365; 6 Lawson's Rights, Remedies, and Practice, sec. 3017, p. 4889; 1 Jones on Mortgages, sec. 65; Burrill on Assignments, 5th ed., sec. 95.

The second objection made to the introduction in evidence of the deed of assignment was that it was void for uncertainty, in that it provides that certain exempt property shall be excepted from the operation of the deed, which exempt property is uncertain in amount. To the descriptive part of the deed, which we have quoted heretofore in this opinion, is added the clause, “Except what are exempt to them (the first parties), or either of them, from execution, by the laws of Montana territory.”

Appellant cites us to no authority holding that such exception renders the deed of assignment void, nor does he suggest any reasons why it should be so held. It was, indeed, so held in Tennessee; but the Tennessee decisions were reviewed, and, as we think, their reasons refuted, in *Richardson v. Marqueze*, 59 Miss. 80, 42 Am. Rep. 353, in which case the court says, after speaking of the Tennessee cases:

“But we dissent from them, in thinking that a failure specifically to describe the exempt property renders the convey-

ance void for uncertainty. If it has any evil effect whatever, manifestly, it must be to render void the claim for exemption, and to cause a forfeiture of such claim. It is the exception or reservation that is insufficiently described, and thereby left uncertain and void, while the conveying words of the instrument, being ³²⁴ definite, and embracing all the property of the grantor, must be operative to pass it all. The rule is well settled that in order to except certain property out of a conveyance, which without the exception would carry all, the words of exception must be as definite as those required to convey title, and that if they are not so the whole property passes. An exception must be a part only of the thing granted; must be a particular thing out of the general one, and must be described with certainty: Coke on Littleton, 142 a. In a grant of land, excepting one anda half acres, the exception is void for uncertainty, and the title to the whole passes to the grantee. The language both of grants and of exceptions is to be taken strongly against the grantor: *Darling v. Crowell*, 6 N. H. 421, and cases cited. We agree, however, with the supreme court of Michigan, in *Smith v. Mitchell*, 12 Mich. 180, that a reservation of exempt property, without a minute specification of it, neither avoids the deed, nor is void in itself for uncertainty. That is certain which may be made certain. The law fixes the amount of the exemption, and points out the mode of its ascertainment. It was remarked by the court, in the case last cited, that 'a *bona fide* selection is as practicable here as under a levy.' We are not aware that officers holding executions or attachments ever experience any difficulty in finding out what is and what is not exempt by law to the debtor; and this, it would seem, can be as readily done by an assignee under a general assignment. Where the right of selection resides in the debtor he can easily be made to exercise it, or forfeit it; and to compel him to do so would seem far more reasonable than to declare a conveyance embracing thousands of dollars' worth of property void, because of the failure accurately to enumerate and describe the two mules, or the four cows and calves, that he claims as exempt."

The authorities are with the view expressed in the Mississippi case: See cases therein cited; also, Burrill on Assignment, 5th ed., sec. 96, p. 142; 4 Lawson's Rights, Remedies, and Practice, sec. 1988, p. 3388, and cases cited in these text-books. Whatever was said in *Goll v. Hubbell*, 61 Wis. 293,

following the Tennessee cases, and looking to appellant's view of this matter, was abandoned upon a rehearing of the case 325 (*Goll v. Hubbell*, 61 Wis. 300), following the case of *First Nat. Bank v. Hackett*, 61 Wis. 336.

We are therefore of opinion that the objections to the deed of assignment were properly overruled. The judgment is therefore affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—SCHEDULE—SUFFICIENCY OF DESCRIPTION.—A general assignment for the benefit of creditors is good without containing a schedule of the property assigned: *Deaver v. Savage*, 3 Mo. 252; 25 Am. Dec. 437, and note. A schedule detailing at large the property transferred is not necessary to the validity of an assignment for the benefit of creditors: *Nye v. Van Huse*, 6 Mich. 329; 74 Am. Dec. 690, and note; *Loomis v. Griffin*, 78 Iowa, 482. A general transfer of all of a person's estate, real, personal, and mixed, as at large and explained by schedule thereof annexed, will be confined to the property enumerated in the schedule: *Scott v. Coleman*, 5 Litt. 349; 15 Am. Dec. 71; *Wilkes v. Ferris*, 5 Johns. 335; 4 Am. Dec. 364, and extended note; *Mims v. Armstrong*, 31 Md. 87; 1 Am. Rep. 22. Unless there is some description to property conveyed, either in the body of the trust deed or the schedule annexed to it, so as to render the property capable of being ascertained and identified, the deed will not ordinarily transfer title, but will be inoperative and void: *Linn v. Wright*, 18 Tex. 317; 70 Am. Dec. 282; *Wilk v. Franklin*, 1 Binn. 502; 2 Am. Dec. 474. See, also, the note to *Turnipseed v. Schaefer*, 2 Am. St. Rep. 26.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS—RESERVATION OF EXEMPT PROPERTY.—A general reservation of exempt property does not invalidate an assignment for the benefit of creditors: *Richardson v. Marquess*, 59 Miss. 80; 42 Am. Rep. 353. An assignment for the benefit of creditors is not made void because of a reservation by the assignor of so much of his property as is exempt by law from execution: *Muhr v. Pinover*, 67 Md. 480; *German Bank v. Peterson*, 69 Wis. 561. Property which is exempt from execution does not pass by the statutory assignment to the assignee: *Mogh v. Peterson*, 75 Cal. 496.

SIMPKINS v. SIMPKINS.

[14 MONTANA, 386.]

JUDGMENT, VACATING FOR EXCUSABLE NEGLIGENCE.—The defendant is entitled to have a judgment vacated on motion on the ground that it was recovered against her through her excusable neglect, when it appears that she was vigilant from her first knowledge of the action, that she employed an attorney to defend it in the state wherein it was pending and of which she was a nonresident; that she forwarded to him a verified answer; and that he refused to file it because she did not accept a compromise negotiated by him and refused to open letters addressed to him and forwarded by her and her counsel from her place

of residence. She cannot be regarded as inexcusably negligent, though she received a letter from the attorney stating that unless she accepted the terms of the compromise he would have nothing more to do with the case and would not file the answer, when she afterward wrote to him explaining that the compromise had never been authorized by her and requesting him to file the answer. She could not anticipate that he would refuse to open and read her letter.

JUDGMENT FOR DIVORCE, VACATING.—THE SUBSEQUENT marriage of the plaintiff does not impose any obstacle to the vacation of the decree of divorce if it was procured through the excusable neglect of the defendant, where such motion is made promptly and within the time allowed by the statute.

SUIT for divorce. The defendant was a resident of the state of Wisconsin. Upon receiving information of the pendency of the suit against her she procured W. S. Burroughs, an attorney of her state of residence, who communicated with Mr. Whitehill, an attorney of the county in which the suit was pending. Mr. Whitehill wrote to Mr. Burroughs acknowledging the receipt of his letter, and promising to look up the complaint in *Simpkins v. Simpkins*, and put in an appearance for the defendant to prevent default being taken against her. In compliance with his promise Mr. Whitehill interposed a demurrer which remained for a considerable time undisposed of. Mr. Burroughs then wrote to the attorney in Montana, stating the facts of the defense, and adding that he thought the defendant would accept the sum of one thousand dollars as alimony. On July 7, 1892, the attorney in Montana sent to the attorney in Wisconsin for verification the proposed answer in the case, with a request that it be returned at once. It was upon its receipt verified, and on July 11th forwarded to the attorney in Montana. On the 9th he wrote Mr. Burroughs respecting some negotiations of a compromise as to alimony. The attorney in Wisconsin replied that the defendant could not accept the sum of one thousand dollars as alimony, and stating the reasons why she would not accept such sum, and proposing that she would accept two thousand in cash, or one thousand with an agreement to pay the additional sum of twenty-five dollars per month to the defendant toward the support of her minor daughter until the latter became twenty-one years of age. Mr. Whitehill replied by a letter of July 24th of the same year, expressing his surprise at the demand of two thousand dollars for alimony, and stating in substance that he had made an agreement to accept the sum of one thousand dollars, and adding, "But I do not propose to bother with Mrs. Simpkins' case

any further. If she wishes to take one thousand dollars and let Simpkins take the divorce, she can get it. If not, I shall withdraw from the case and you may arrange at once for some other attorney to appear for her. I shall not file the answer at all. Answer at once by telegraph whether this offer is accepted or not." On the receipt of this letter a telegram was sent to the attorney in Montana stating that Mrs. Simpkins would not accept and directing him to file the answer and an application for alimony. On receiving this telegram Mr. Whitehill declined to file the answer, refused to have any thing further to do with the case, and so informed plaintiff's attorney. At the time of sending the telegram, defendant by her counsel in Wisconsin also forwarded a letter to Mr. Whitehill urging him to file the answer. He, however, on receiving the letter refused to open it, and returned it unopened to the writer, and before it had been received the demurrer interposed in the defendant's behalf had been overruled and she given twenty-four hours in which to answer, and not having answered in that time, her default was entered and judgment subsequently taken and granting the plaintiff the divorce, and thereafter on the same day, to wit, August 15th, he married again. On the 22d of the following September the defendant moved to set aside the judgment, open the default, and for leave to defend the action. The motion was denied, and she thereupon appealed.

Brazelton & Scharnikow, for the appellant.

Rogers & Rogers, for the respondent.

292 Per CURIAM. The motion of defendant in this case to open the default was upon the ground of alleged excusable neglect on her part. The Code of Civil Procedure provides that "the court may relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect": Code Civ. Proc., sec. 116.

Defendant contends upon her motion that, if there were any neglect on her part in allowing default and judgment to go against her, it was excusable. It is perfectly evident from all the facts shown by defendant's affidavit, and by the correspondence between her counsel in La Crosse and Deer Lodge, that she was anxious to defend this action. There is nothing whatever looking to any intention to neglect it or

allow it to go by default. Her attitude was that of vigilance from her very first knowledge of the commencement of the action up to the time when she learned that the judgment had been rendered. At that time she came at once from Wisconsin to Deer Lodge, a distance of one thousand two hundred miles, and ~~she~~ promptly commenced proceedings for the purpose of setting aside the judgment and obtaining leave to defend the action. She had at once, upon receiving the summons by mail, consulted an attorney at her home in Wisconsin, and through him had secured the services of an attorney at Deer Lodge. She was cognizant of the letters written by Mr. Burroughs to Mr. Whitehill. From them it clearly appears that she was extremely vigilant and attentive to every step in the case. When finally the judgment was rendered against her she had at that time a verified answer in the hands of her Deer Lodge attorney, setting up a complete and meritorious defense.

Wherein was defendant's negligence? It was sought to be argued that it was in not at once employing other counsel upon the receipt by her of Mr. Whitehill's letter of July 24th, in which he said that unless she accepted certain terms of compromise, which he set forth, he would have nothing more to do with the case. It appears by Mr. Titus' affidavit, in contradiction of defendant, that at this time the defendant and her La Crosse attorney knew the names of Deer Lodge attorneys other than Mr. Whitehill. It is claimed by plaintiff that it was negligence in defendant, in that upon the receipt of this letter she did not at once employ some one else. But it must be remembered that Mr. Whitehill then had charge of her case, and that he had in his possession the verified answer which she had sent to him to file. Furthermore, Mr. Whitehill never informed defendant that he had withdrawn from the case. He had simply told her that he would do so if she did not accept those certain terms, which she claims she had never authorized him to offer to plaintiff. The most that appears is that Mr. Burroughs had said at one time that he thought those terms might be accepted. Burroughs telegraphed for Mrs. Simpkins, to Whitehill, that she did not accept the terms, and requesting Whitehill to file the answer and go on with the defense. Then it was that Burroughs wrote fully, setting forth, by reference to the correspondence, that defendant had not authorized the offer which Whitehill thought he had power to make. This was July 28th. This

letter Mr. Whitehill never opened. Nor did he open the two others which followed it; but, on the other hand, he returned them unopened to the ³⁹⁴ writer. We are of opinion that the defendant and her La Crosse representative had reason to expect at least that these letters would be opened and read by Mr. Whitehill. They explained fully that the offer which Mr. Whitehill claimed that he was authorized to make to plaintiff's attorney had not been so authorized. The defendant had the right to believe that when Mr. Whitehill received these letters he would read them, and that, having read them, their contents would lead him to file her answer, or place her in some position to secure other counsel, or at least notify her of his withdrawal from the case.

No question was raised as to Mr. Whitehill's fees, and, the defendant having the right to believe that her Deer Lodge counsel would read the letters following July 28th, there was no reason apparent to her why he would leave her in default. If Mr. Whitehill had read the unopened letters he would have read therein the defendant's statements that he (Whitehill) was mistaken when he considered that he was authorized to make the offer to plaintiff's attorney which he mentions in his letter of July 28th, and the nonconcurrence in which proposition by defendant was the cause of Whitehill's threatened withdrawal. Then Mr. Whitehill, or any other fair attorney, if he still persisted in withdrawing from the case, would have notified defendant, and put her in a position not to suffer a default by his withdrawal. That is to say, this is what defendant, sitting in her home at La Crosse, one thousand two hundred miles from the court, had reason to believe; and, so having reason to believe, she was not negligent in acting as if she so believed.

We can see no negligence whatever of defendant which was not absolutely excusable; and indeed it is difficult to find any negligence on her part at all.

Under all these facts of the case we are of opinion that it would be a reproach upon the administration of the law to allow this judgment to stand. Divorce laws and procedure in some jurisdictions are often a subject of adverse criticism. If such a proceeding as the one before us is allowed to pass with approval or unchallenged such criticism would be wholly just.

³⁹⁵ It is urged that the merits of the motion are affected by the fact that plaintiff has remarried since the rendering

of the divorce judgment. Yes, plaintiff has remarried, according to the record, and he did this before the ink was dry upon the judgment divorcing him by default from the woman who had been his wife for twenty-five years, who had borne his children and reared them to near their majority, and who had kept the home and hearth for him and his children during all these years. And this judgment, obtained without a hearing on the part of defendant, was upon a complaint not charging cruelty or adultery, or any of the graver offenses against the marriage contract, but upon a complaint alleging desertion only, and a desertion after twenty-five years of married life—a charge by plaintiff, upon the truth of which all the circumstances of this case throw the gravest suspicion. In this connection it is appropriate to notice the verified answer which was tendered with the motion. That answer not only denies the allegation of desertion, but it emphatically denies that plaintiff is a resident of the state of Montana, and it sets up facts which, if true, show that he is a resident of the city of La Crosse, Wisconsin. It alleges that the plaintiff was a railroad conductor, and that he was employed in different places, and that, after having had many homes at divers times, they finally settled in this home in La Crosse; that plaintiff always treated it as such, and that he spoke of it as such in the letters which he wrote to defendant and his children; that he wrote to them in affectionate terms, and visited them up to a short time before commencing this suit, and up to that time sent them money and presents; and that never did he intimate his claim of defendant's alleged desertion, or of his intention to claim a residence in Montana. Now, under all these circumstances, for plaintiff to claim that his remarriage, in this hot and indecent haste, is pertinent upon this motion is a sorry sort of reply to the motion of defendant setting up the pitiable facts disclosed by this record. Nor is the situation of the person whom plaintiff purported to marry on August 15th a consideration that can set aside the rights of this defendant. Such condition is not of defendant's creation or her fault.

*** The order denying the motion to open the default is reversed, and the case is remanded, with directions to the district court to grant the application, and to set aside the judgment, and allow defendant to file her answer and make defense.

All concur.

JUDGMENT OF DIVORCE—ANNULMENT AFTER SUBSEQUENT MARRIAGE.—A decree of divorce obtained by fraud may be vacated at a subsequent term, although a marriage was contracted on its faith, and issue born: *Allen v. Maclellan*, 12 Pa. St. 328; 51 Am. Dec. 608. The fact that a marriage has taken place in another state on the faith of a previous divorce there does not prevent inquiry by the courts of another state as to its validity and a denial of such validity if the divorce is one that would be decreed void if it were directly in issue: *Adams v. Adams*, 154 Mass. 290. See, also, the note to *Brown v. Grove*, 9 Am. St. Rep. 826.

JUDGMENTS.—VACATING FOR EXCUSABLE NEGLECT: See the notes to *Taylor v. Pope*, 19 Am. St. Rep. 533; *Williams v. Wescott*, 14 Am. St. Rep. 296, and the extended note to *Burnham v. Hays*, 58 Am. Dec. 397: See, also, *Leaming v. McMillan*, 59 Ark. 162; *ante*, p. 26, and note.

QUIRK v. MULLER.

[14 MONTANA, 467.]

EVIDENCE, CONTRACT TO PROCURE.—A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts.

ACTION to recover for personal services of the plaintiff in the suit of *Muller v. Buyck*. This was an action brought by defendant therein to recover possession of certain lands which she had conveyed to Buyck, and to have the conveyance thereof canceled, and the plaintiff herein agreed, respecting that action "to make search and inquiry and ascertain the names of persons who were familiar with the property, and acquainted with the defendant Buyck and with the facts and circumstances connected with the execution of the instrument aforesaid, and the financial circumstances of the defendant Buyck, and to procure such other testimony which when introduced in the court in an action duly and regularly brought would entitle the said defendant to the possession of said property and the cancellation of the said instrument, and restore to her all her rights in such property." Judgment for the plaintiff; defendant appealed.

J. M. Clements, for the appellant.

Walsh & Newman, for the respondent.

470 DE WITT, J. We are of opinion that the complaint is not sufficient to sustain the judgment. The learned dis-

strict judge would have doubtless so held if the point had been made before him. We believe that the contract set out in the complaint is void as against public policy, and as tending to impede the ⁴⁷¹ administration of justice. The plaintiff was employed, not only to make search and inquiry for witnesses, and to ascertain the names of persons acquainted with the facts and circumstances, but also, in addition to this, to procure such other testimony which, when introduced in evidence, would entitle the said Anna Muller to recover possession of the property. The searching for witnesses who had disappeared or documents which had been lost, or the performance of legitimate detective work, is not subject to objection. But the plaintiff was, according to his contract, to do more than this. These things he was to do, but they were not considered sufficient. He added to them, and contracted, in connection with them, that he would, in effect, procure testimony that would win a lawsuit. It is alleged further, in effect, that the testimony which he thus procured did win the lawsuit. Indeed, the contract, brought down to a simple statement, is that plaintiff agreed, for a consideration, to procure testimony that would win the lawsuit. He procured the testimony, and it won the suit.

We do not hold the contract void because it was an agreement to procure perjury, or because it did procure perjury, but the contract had the tendency and opened the very strong temptation to the procurement of perjury.

Mr. Bishops says: "The mere tendency of a contract to promote unlawful acts renders it illegal, as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts": Bishop on Contracts, sec. 476.

In the case of *Wellington v. Kelly*, 84 N. Y. 543, the court found that the particular contract there under review was a legitimate and proper one, but, upon the general principle of contracts to furnish evidence for a lawsuit, Judge Andrews, in the opinion, says: "In *Stanley v. Jones*, 7 Bing. 369, it was held that an agreement made by a third person to communicate to a person claiming to have been defrauded such information as would enable him to recover damages for the fraud, and to exert his influence to procure evidence to substantiate the claim, upon condition of receiving portion of the sum recovered, was illegal. In that case the person making the agreement to communicate the information was an entire ⁴⁷²

stranger in interest to the proposed litigation, and professed to have knowledge of facts of importance to the party, but which he did not disclose. Lord Denman said that such an agreement was illegal, from its manifest tendency to pervert justice, and we fully assent to the decision in that case. An agreement by a stranger to furnish evidence to substantiate a claim or defense, for a compensation depending upon the success of his efforts, is dangerous in its tendency, as furnishing an inducement for perjury and the subornation of witnesses." In the English case cited in the New York report, the person contracting to furnish the evidence agreed that "he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant": *Stanley v. Jones*, 7 Bing. 379. There is a very considerable similarity between the contract which was condemned by the English court and that which is now before us.

The supreme court of Illinois took occasion, in the case of *Gillett v. Board of Supervisors*, 67 Ill. 256, to treat this subject in very vigorous and pertinent language. A case was about to be tried involving the legality of an election to determine whether the county should subscribe for certain railroad bonds. The legality of the election which had been held being questioned, and the county supervisors, apparently desiring to overthrow the result of the election, made certain contract as to the procuring of testimony to attack the result of that election. In the contract which the supervisors made with one McNeal, they provided as follows: "That if he [McNeal] will hunt up testimony, and prepare the same, and present it to the proper authorities who may be authorized to receive it, and, after said testimony or evidence is fully received, and shall be acknowledged as legal, then, for said services, said McNeal is to receive from Logan county the following amounts: For ten illegal votes, so proved, \$100; for ten other illegal votes, so proved, \$200; for ten other illegal votes, so proved, \$300; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400; for ten other illegal votes, so proved, \$400. The above-mentioned illegal votes must be in place of, answer to, or represent ⁴⁷³ certain unknown names on the east and west Lincoln poll-books of the election above mentioned. The condition of this obligation is such that the said McNeal is to pay all his own individual expenses, and the ex-

penses of any parties whom he may employ in preparing such testimony, and finding such testimony, and finding such witnesses; and that above amount, or any part of the same, shall not be due or payable until the illegality of such votes is legally proven. It is further agreed that, in case the county of Logan is finally released from any liability to pay said bonds now in dispute between said county and the P. L. and D. R. R. Company, by means of proving the majority in said election to be illegal, the county of Logan further agrees to pay said M. B. McNeal the sum of twelve hundred dollars, which said amount is to be in addition to the scale of prices above mentioned, and payable only after the courts have decided the case in favor of the said county."

The supreme court of Illinois in passing upon this contract, said: "The evidence disproved the actual use by the committee of any corrupt means or any corrupt design, on their part, in the use of the money. But the contracts themselves are pernicious in their nature. They created a powerful pecuniary inducement on the part of the agents so employed that the testimony should be given of certain facts, and that a particular result of the suit should be had. A strong temptation was held out to them to make use of improper means to procure the needful testimony, and to secure the desired result of the suit. The nature of the agreement was such as to encourage attempts to suborn witnesses, to tamper with jurors, and to make use of other 'base appliances' in order to secure the necessary results which were to bring to these agents their stipulated compensation. The tendency of such arrangement must be to taint with corruption the atmosphere of courts, and to pervert the course of justice. A pure administration of justice is of vital public concern. It tends to evil consequences that any such venal agency as is constituted by these contracts should have a part in the conduct of judicial proceedings where the attainment of right and justice is the end. Should such contracts of this character receive countenance we might, among the multiplying forms of agency of the time, have to ⁴⁷⁴ witness the scandalous spectacle of a class of agents holding themselves out to the public as professional procurers of desired testimony for litigants in court for pay, contingent upon success in their suits. In *Marshall v. Railroad Co.*, 16 How. 314, it was held that a contract or a contingent compensation for obtaining legislation was void by the policy

of the law. With much greater reason, we think, should the contract under consideration be held vicious. We cannot sanction them. On account of their corrupting tendency we must hold them to be void, as inconsistent with public policy": *Gillett v. Board of Supervisors*, 67 Ill. 256. See, also, *Patterson v. Donner*, 48 Cal. 369.

We fully concur in the views expressed in these cases, and we are of opinion that the contract under consideration falls within the objectionable class. To be sure, under the contract the plaintiff, Quirk, may have performed only innocent acts, and there is nothing to indicate that both his intentions in making the contract and his acts in carrying it out were other than wholly innocent and lawful. But the contract was just such an one as to encourage an unlawful act. It invited subornation of perjury. It held out a large reward for success. The amount claimed by plaintiff was some \$1,800. The obtaining of this large sum depended upon plaintiff procuring testimony which would win the lawsuit. The law does not tolerate the offering to any one, no matter how virtuous, of such temptations to crime. The evils and vices of such a contract are strongly stated in the language of the Illinois court, quoted above. It would, indeed, be a sad spectacle to see springing up in this state the business of procuring testimony sufficient to win lawsuits. We regretfully express the fear that perhaps such a business might find a patronage. But from such a result we will secure ourselves by declaring void a contract the manifest tendency of which is to present the direct temptation and the great inducement to one to procure subornation of perjury. There is here too close an approach to the evil maxim, sometimes quoted: "Get money; honestly, if you can; but get money." The contractor in plaintiff's position could only too easily be led to say to his conscience: "I will procure the necessary testimony; honestly, if I can; but I ⁴⁷⁵ will procure the testimony." The evils of such contracts are illustrated in the very case for which this plaintiff contracted to procure the testimony which would succeed in winning a judgment for plaintiff therein. That case was before us on appeal, and is reported in *Muller v. Buyck*, 12 Mont. 354. In our investigation it appeared that practically the only witness for the plaintiff was herself. It seems that the case rested solely upon the testimony of plaintiff, Muller, and the defendant, Buyck. So, if it be true that plaintiff herein, Quirk, pro-

cured the testimony which won the judgment in *Muller v. Buyck*, he procured the plaintiff herself to testify, and the only construction of the situation by which it could be claimed that he procured any testimony would be that he procured or instructed her to testify as she did, because it was her testimony that won the case. It does not appear, on an inspection of the decision in that case, that plaintiff herein did or could have rendered service of such nature, or any other. We speak of this as an illustration of the evil tendency of such a contract as is pleaded in the complaint in this case.

We think that nothing here said can be interpreted as forbidding the offering of rewards for the detection of crime, or the employing of persons to search for material witnesses or important papers or documents or exhibits which have been lost. We think that no difficulty will arise in sustaining contracts for the performance of legitimate services, while the stamp of disapproval is put upon contracts clearly *contra bonos mores*.

The judgment is reversed, and the case is remanded, with directions to dismiss the complaint.

PEMBERTON, C. J., and HARWOOD, J., concur.

CONTRACTS TO PROCURE EVIDENCE.—VALIDITY OF: See the extended note to *Cobb v. Cowdery*, 94 Am. Dec. 375-378; also *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459.

KLEINSCHMIDT v. GREISER.

[14 MONTANA, 484.]

EQUITY—JURY TRIAL.—THE VERDICT OF A JURY IS NOT CONCLUSIVE upon a court in an equity case by virtue of section 250 of the Code of Civil Procedure of Montana. It will not be presumed from any devious and uncertain language that the legislature undertook to prune away one of the most distinctive and important jurisdictional functions of the equity courts.

WATERS.—ABANDONMENT OF AN APPROPRIATION OF WATER DOES NOT RESULT FROM A CHANGE IN THE MODE OF DIVERSION and the abandonment of the ditches by which the diversion was first made and the use of others in place thereof.

WATERS.—AN APPROPRIATION OF WATER CANNOT BE CUT DOWN to the quantity necessary to irrigate the lands which the appropriator had in cultivation at the time when a subsequent appropriation was made or attempted, if the first appropriator had other lands suitable for irrigation which he had not yet subdued to the plow.

Shober & Rasch, for the appellants.

Tools & Wallace, for the respondents.

493 Per CURIAM. The purpose of this action is to adjudicate and determine a controversy between plaintiffs and defendants regarding their priority of right, by appropriation, to use the waters of Prickly Pear creek and its tributary, Cañon creek, situate in Lewis and Clarke county, for irrigation of agricultural lands adjacent thereto.

Plaintiffs allege appropriation about November 11, 1882, of four thousand inches of water from Cañon creek, a tributary of Prickly Pear creek, diverted by means of a dam and ditch, whereby that quantity of said water is conveyed to the lands of divers persons, who own said dam and ditch in common; that such appropriation on the part of plaintiffs is prior to defendants' appropriation of the waters of said creek; that defendants have wrongfully interfered with and removed said dam, thereby preventing plaintiffs' diversion of the waters from said creek, and threaten to continue so to do, thus depriving plaintiffs of the use and enjoyment of their alleged prior right to the use of said waters. Wherefore they seek judgment establishing their alleged right as prior to that of defendants, 494 with permanent injunction forbidding defendants' interference therewith.

Defendants, by answer, allege appropriation and diversion of diverse quantities of the waters of Prickly Pear creek by them, respectively, or their predecessors, aggregating nineteen hundred inches, according to statutory measurement, all of which appropriations on the part of defendants are alleged as of dates several years prior to the appropriation by plaintiffs. Defendants also allege that their several appropriations were and are necessary for the irrigation of the agricultural lands owned by them, respectively. The jury sitting in the trial appear to have returned findings satisfactory to defendants, awarding them, severally, about the amount of water claimed prior to plaintiffs' appropriation; but the court modified the findings of the jury, and supplemented the same by some further findings, whereby the quantity of water found by the jury to have been appropriated by defendants, prior to the appropriation by plaintiffs, was diminished to three hundred and twenty inches, distributed among them as follows: Greiser, sixty inches by appropriation of 1871; Leedy, forty inches by appropriation

of 1871, and forty inches by appropriation in 1868; Kenck, Duffy, and Coppler, jointly, one hundred and eighty inches by appropriation March 1, 1882. Following those appropriations, in order of time, the court found plaintiffs appropriated seventeen hundred and sixty inches of water of said creek, necessary for their use in the irrigation of their agricultural lands. There were some further appropriations found in favor of defendants, but of dates subsequent to the appropriation by plaintiffs. Decree was entered accordingly. Defendants appeal, insisting that the court erred in several points specified, all of which have been carefully considered in the light of the record.

The first proposition urged by appellants is that, notwithstanding this case is properly classified as in the nature of an action in equity, the court is bound, by virtue of the peculiar provision of section 250 of the Code of Civil Procedure, to make its decree in conformity with the verdict of the jury. This proposition has been several times argued to this court, and given due consideration, resulting on each occasion in the ⁴⁹⁵ conclusion, remarked in *Arnold v. Sinclair*, 12 Mont. 248, that it will not be presumed, from any devious or uncertain language, that the legislature undertook to prune away one of the most distinctive and important jurisdictional functions of the equity court; and, when a statute is found clearly expressing that intention, it will be time enough to inquire as to whether the legislature possessed power to that end.

Passing to a consideration of the points of error specified in relation to the findings of fact, we find that the record, which purports to contain a transcript of all the evidence introduced, does not disclose evidence sufficient to support the finding by the court that defendant Greiser abandoned, in the year 1877, all but sixty inches of his original appropriation of the waters of said creek. According to the evidence shown by the record defendant Greiser constantly used the waters appropriated for his ranch, but from time to time diverted the same through different ditches, and in 1877 he abandoned an older ditch formerly used for the same purpose. This does not constitute abandonment of his water right, or any part thereof, nor does any evidence in the record support such finding. Nor is there evidence in the record sufficient to warrant the finding by the court to the effect that defendants Duffy and Coppler did not acquire

an interest in the Tierney ditch until May, 1885. The undisputed evidence, as disclosed by the record, shows that they acquired an interest in said Tierney ditch in June, 1882, and that testimony is corroborated by the joint notice of appropriation of the waters of said creek by Tierney, Duffy, and Coppler, introduced in evidence, which bears date May 25, 1882, and declares their appropriation as of that date. Nor is there evidence in the record sufficient to warrant the finding that, after Duffy and Coppler acquired interests in said Tierney ditch, they enlarged the same to a capacity sufficient to divert the water by them appropriated. The testimony of witnesses on this point is emphatically to the contrary effect, except that of witness Ford, who, under contract, for the owners, continued the excavation of said ditch after Duffy and Coppler acquired interests therein. In his testimony he describes his work upon said ditch, and says that he enlarged or widened the excavation of a portion of the ditch, where the work of ⁴⁰⁶ Tierney in the excavation thereof was left off; that Tierney directed Ford to widen the ditch in that part, explaining that the last of his excavation was done in the winter, and was not made of sufficient width at that part. But Ford distinctly testifies that it was only the portion of the excavation toward the end, where Tierney left off, that he enlarged. His testimony, under such explanation, becomes consistent with that of other witnesses on this point, all of which is insufficient to support the finding that the part of said ditch already excavated by Tierney was enlarged after Duffy and Coppler acquired interests therein. The effect of the finding by the court on this point would place the appropriation of Duffy and Coppler as of May, 1883, subsequent to that of plaintiffs.

There is another finding by the court to the effect that only a portion of certain ranches owned by defendants was available for irrigation, and apparently upon that theory the quantity of water allotted to them by the findings of the court was very considerably diminished from the amount appropriated and diverted through their ditches, and claimed to be necessary to irrigate their lands. It is always proper to inquire into the question of the necessity and ability to use the quantity of water appropriated and diverted. If it should appear from proper evidence that a portion of defendants' lands is so situate that the water claimed by such defendants could not be diverted thereto, or that the land is of such

character or condition as that crops of grass, grain, or vegetables could not be grown thereon with the aid of irrigation, it would seem proper to take such conditions into consideration in determining the amount of water to which such defendants were entitled. But the evidence in this case does not warrant the finding that only the portions of the lands owned by defendants, as designated by the court, were "available for irrigation." It does not appear from the evidence that there was contention by the litigants that certain portions of the ranches of defendants were of such character, or so situate, as not to be available for irrigation.

There was much evidence introduced on the question as to the quantity of water necessary, per acre, to irrigate certain lands owned by defendants, and how the quantity varied when ⁴⁹⁷ applied to different characters of soil. There was also considerable evidence introduced on the inquiry as to how much land defendants had under cultivation at the date of plaintiffs' appropriation out of the waters of said creek, in the fall of 1882; and some findings by the court tend to indicate that it proceeded, in determining the quantity of water to which defendants were entitled prior to plaintiffs' appropriation, on the theory that defendants were entitled to hold, prior to plaintiffs' appropriation, only a sufficient quantity to irrigate the lands which defendants actually had under cultivation at the date plaintiffs initiated their appropriation. It is not shown with clearness and certainty that the court proceeded on such theory, but certain findings by the court, stating particularly that the defendants named had under cultivation at the date of plaintiffs' appropriation a stated acreage of land, tend to indicate that the court proceeded on the theory that defendants' appropriation of water prior to plaintiffs' should be cut down to a quantity sufficient to irrigate the land of defendants actually cultivated at that time. Such theory, if followed, is, we think, without doubt, erroneous. Thereby a prior appropriator of water would be cut down to the quantity necessary to irrigate the land he actually had under cultivation when the subsequent appropriation was made, although the first appropriator's land was all available for production of crops by aid of irrigation, but, at the time of making the appropriation of water necessary for its irrigation, he had not subdued all of it to the plow. The priority under such rule would depend largely upon the time appropriators brought their lands under cultivation, and not

upon the priority of appropriation and diversion of the water necessary to irrigate the land owned by the appropriator, as the law provides.

A further objection urged by appellants is that the decree maintaining the dam against defendants' interference would in certain seasons, in effect, withhold all the water of said creek from appellants—even that awarded them by the decree prior to the appropriation of plaintiffs. Respondents answer this objection by admitting that the intention of the decree was to have the dam so constructed and operated as to allow the volume of water awarded defendants prior to the right of ⁴⁹⁸ plaintiffs to pass it at all times, if so much water flowed in the creek, and concede that if the decree is not thus conditioned it may be modified to that effect.

Appellants also urge that the decree does not provide at what point they may take the water awarded to them in several amounts. It appears to be agreed that the appropriator of water should have the amount to which he is entitled at the place where his ditch taps the creek, and appellants concede that if the decree in this case does not provide that respondents shall allow sufficient water to flow past their dam to give the appellants, at the points where their several ditches tap said creek, the amount of water awarded them, the decree may be modified to so provide. In our opinion that would be a proper provision, and the decree should be conditioned accordingly.

For the reasons above set forth the judgment entered ought to be reversed, and the case remanded to the trial court for revised findings in conformity with the views herein expressed, upon the evidence already before the court, supplemented by such other evidence as may be necessary to ascertain and determine the respective rights involved. The order of this court will be entered accordingly.

HARWOOD and DE WITT, JJ., concur.

EQUITY—JURY TRIAL—CONCLUSIVENESS OF VERDICT BY JURY.—In an equitable action, where neither party is entitled to a jury trial, the verdict of a jury, if one is called, may be disregarded by the court: *Clark v. Mosher*, 107 N. Y. 118; 1 Am. St. Rep. 798. When the chancellor desires the aid of a jury to find out how facts appear to such unprofessional men it can be done only by submitting single issues of fact, and the jury cannot foreclose him in his conclusion unless his judgment is convinced: *Brown v. Buck*, 75 Mich. 274; 13 Am. St. Rep. 438, and note. Where the parties to an equity case have submitted the issues to a jury, and a full investigation

has been had, every doubt in the mind of the chancellor should be solved in favor of the finding of the jury. Unless such finding is unconscionable it should be allowed to stand: *McDaniel v. Marygold*, 2 Iowa, 500; 65 Am. Dec. 786, and note. See, also, the notes to *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 188.

WATERS — APPROPRIATION — CHANGING POINT OF DIVERSION.—A prior appropriator of water from a stream may change the point of diversion and the place of use without affecting his right of priority, so long as the rights of others are not injuriously affected: *Strickler v. Colorado Springs*, 16 Col. 61; 25 Am. St. Rep. 245, and note.

WATERS — APPROPRIATION — INCREASING AMOUNT.—Prior appropriators of water for mining purposes are not limited to the quantity of water they have turned into their ditch in the first instance unless by the general size, plan, and grade of the ditch it was not capable of carrying more water than was then diverted: *White v. Todd Valley Water Co.*, 8 Cal. 443; 68 Am. Dec. 338, and note.

THAMLING v. DUFFEY.

[14 MONTANA, 567.]

NEGOTIABLE INSTRUMENTS—PLEADING FRAUD IN INCEPTION OF.—An answer in an action by the indorsee of a negotiable instrument which avers fraud in its inception, but does not allege that the plaintiff participated in or had notice of the fraud at the time of the indorsement to him, is sufficient. The plaintiff, if such fraud is proved, must assume the burden of establishing that he was the indorsee for value before maturity and without notice of the fraud which is sought to be asserted as a defense.

Thompson & Maddox, for the appellant.

Smith & Gormley, and Waterman & Callaway, for the respondent.

571 PEMBERTON, C. J. The complaint in this case alleged that on March 6, 1893, the defendant executed and delivered his negotiable promissory note to Hatch Bros. & Co. for five thousand dollars, with interest, payable five months after date; that on or about the first day of April, 1893, and before the maturity thereof, the said Hatch Bros. & Co. indorsed the same to plaintiff, who, in this action, demands judgment for the amount of said note. In his answer defendant admits the execution and delivery of said note, as alleged, but resists the recovery of judgment thereon, on the ground of fraud practiced upon him by said Hatch Bros. & Co. in the inception of said instrument. The answer does not allege that plaintiff, the indorser of said note, participated in the alleged fraud, or had 572 knowledge thereof at the time of the in-

dorsement of said note to him. It is not denied that the fraud alleged in the inception of the note would defeat a recovery thereon in an action by the original holders. The plaintiff filed a replication denying any knowledge of the fraud alleged in the answer. After filing said replication the plaintiff moved the court for a judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. This motion was sustained by the court, and judgment rendered in favor of the plaintiff for the amount of said note and interest. From this judgment this appeal is prosecuted.

The question presented by this appeal is, Was it essential to the sufficiency of the answer that it should allege that plaintiff had knowledge of the fraud alleged in the inception of said note at the time it was indorsed by him? In other words, did the allegation of fraud in the inception of the note, contained in the answer, place the burden of proof of *bona fides* upon the plaintiff, or was the defendant required to allege and prove knowledge of such fraud on the part of plaintiff at the time the note was indorsed to him?

Mr. Bliss, in his work on Code Pleading (2d ed., sec. 395), says: "In an action upon negotiable paper the defendant may plead fraud or illegality, or that the bill or note was lost or stolen; and it is well settled that in showing such fraud, etc., he makes a good *prima facie* defense, and that the plaintiff must show affirmatively that he is a *bona fide* holder for value. But, in such case, how should the issue be made on paper? Upon principle, every pleader who, in submitting evidence, holds the affirmative of an issue, must plead the facts upon which the issue is made. It is, however, common in pleading fraud, illegality, or other matter going to the validity of a bill or note in the hands of an indorsee, to also aver a want of consideration, and to charge notice. Is this averment necessary? Is it sufficient for the plaintiff to traverse it if made, or should he affirmatively allege the facts he is required to prove? I do not find these questions settled upon authority. In the analogous cases of a bill to enforce an equity against one who has obtained the legal title, whether to land or chattels, it is sufficient for the plaintiff to show the equity; he thereby makes ⁵⁷³ a *prima facie* case against the world. A purchaser for consideration without notice will, however, be protected. In his plea or answer the purchaser of land must aver expressly that the person who

conveyed was seised, or pretended to be seised, when he executed the conveyance, and that he was in possession, must state consideration, and its actual payment, and must deny notice, whether it has been averred by the opposite party or not. The purchaser of stock, if he would defend against a plaintiff's *prima facie* title, must affirmatively state in his answer, and must prove the facts showing that he was a *bona fide* purchaser for value. In the matter under consideration the plaintiff, after the defendant's showing, can only protect himself by his relation to the paper. In itself it is good for nothing, but when one has put his name to a negotiable instrument the law merchant, for commercial reasons, will protect the innocent holder, the person who has obtained it in good faith and for value. As we have seen, he must prove that he has obtained it, as must the holder of a legal title to property as against the holder of an equity. It would seem, both from analogy and upon principle, that he should be required to affirmatively plead the facts that thus protect him, which he is required to prove, and that the allegation of notice, etc., in the answer is unnecessary": And see authorities cited.

In *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, a case involving the doctrine involved in the case at bar, the court says: "The learned counsel for the plaintiff contends that in this case the burden of proving notice to the plaintiff of the facts connected with the execution of the note, and of the fraud, if any, was upon the defendant, and that, in the absence of such proof by the defendant, the plaintiff was entitled to recover. We think that this proposition cannot be maintained. Doubtless some support may be found for it in certain elementary books, and in some of the adjudged cases in other states. But in this state it must be regarded now as a settled rule that, when the maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a *bona fide* purchaser: *First Nat. Bank v. Green*, 43 N. Y. 298; *Farmers' etc. Bank v. Noxon*, 45 N. Y. 762; ⁵⁷⁴ *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Wilson v. Locke*, 58 N. Y. 643; *Grocers' Bank v. Penfield*, 69 N. Y. 502; 25 Am. Rep. 231; *Nickerson v. Ruger*, 76 N. Y. 279; *Seymour v. McKinstry*, 106 N. Y. 240; *Stewart v. Lansing*, 104 U. S. 505; *Smith v. Livingston*, 111 Mass. 342; *Sullivan v. Langley*, 120 Mass. 437. The plaintiff did not satisfy

this rule by showing that he paid value for the note; it was necessary, in order to entitle him to recover, to go further, and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin."

In *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, a recent and well-considered case, the court of appeals of New York say: "The plaintiff claims that the proof showing it purchased the notes before maturity, paying value therefor, conclusively establishes its character as a *bona fide* holder, and entitles it to recover, in the absence of proof showing that it had notice or knowledge of facts constituting a defense to the action. The plaintiff's contention eliminates the element of good faith from the transaction; and assumes that the language, 'a holder for value,' as used in the authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this state, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account, with other facts, in determining the question of the *bona fides* of the transaction, and, when full value is paid, is entitled to great weight; but that fact is never conclusive, except in the absence of evidence tending to show notice of bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills and negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a *bona fide* holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. This has been the law in this state since the case of *Bay v. Coddington*, 5 Johns. Ch. 54; 9 Am. Dec. 268; 20 ⁵⁷⁵ Johns. 637; 11 Am. Dec. 342. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction; but where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder in order to succeed, to go further, and show the circumstances under which it came into his possession, and that he has acted in good faith in the

transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books; and, while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of the character claimed to be protected: 1 Parsons on Notes and Bills, 258. . . . A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the state hold that, upon proof by the defendant that his obligations have been fraudulently or illegally obtained, and put in circulation, the person seeking to recover upon them must show, not only that he bought before maturity and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference, in the question presented, whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumptions of *bona fides* which accompany the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or, as in this case, he makes the proof of such circumstances as part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a *bona fide* ⁵⁷⁶ holder, in a case where the proof shows that the paper has been fraudulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and, when this is done, the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith. The question of law involved in this case was considered in the case of *Vosburgh v. Dieffendorf*, 119 N. Y. 360, 16 Am. St. Rep. 836, and there received the unanimous approval of the court."

In *Stewart v. Lansing*, 104 U. S. 505, Mr. Chief Justice Waite, speaking for the court, says: "It is an elementary rule that, if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover,

must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough: *Smith v. Sac County*, 11 Wall. 139. Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff to show that he occupied the position of a *bona fide* holder before he could recover."

It cannot be said that the authorities are uniform or harmonious upon the questions involved in this case. But we are of the opinion that the authorities cited contain the better and sounder reason on the questions involved. It might frequently occur that a defendant in such a case would be powerless to allege or prove knowledge in the plaintiff of the fraud which tainted the note sued on, at its inception—this knowledge being peculiarly within the breast and possession of the plaintiff—whereas it would very rarely be a hardship upon an indorsee to require him to show his *bona fides* by proving the circumstances and facts under which he became the owner and holder of the paper on which he sues. From the foregoing authorities and consideration we are of the opinion that the allegation of fraud in the inception of the note sued on, contained in the answer, contained a *prima facie* defense, and placed the burden of proving *bona fides*, which includes a want of knowledge of the fraud alleged, upon the plaintiff in this case; and, if so, the burden of pleading such want of knowledge was upon him, necessarily. It therefore follows ⁵⁷⁷ that the action of the trial court in rendering judgment on the pleadings was error.

The judgment is reversed and the cause remanded for trial.

HARWOOD and DE WITT, JJ., concurred.

NEGOTIABLE INSTRUMENTS—FRAUD IN INCEPTION AS AFFECTING BONA FIDE INDORSEE.—One who signs an instrument which he knows to be a promissory note of some kind, relying upon the statements of the party opposed to him in the contract as to its nature, and without informing himself as to its contents, is guilty of such negligence as will preclude him from availing himself in an action on the note by a *bona fide* indorsee for value, of the defense that his signature was fraudulently obtained: *Ward v. Johnson*, 51 Minn. 480; 38 Am. St. Rep. 515, and note. This question is fully discussed in the extended notes to *Willard v. Nelson*, 37 Am. St. Rep. 458, and *Bedell v. Herring*, 11 Am. St. Rep. 309.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

MURRAY v. MACE.

[41 NEBRASKA, 60.]

TRESPASS BY OFFICER IN EXECUTION OF WRIT—PLAINTIFF'S LIABILITY.—

One who places in the hands of an officer a valid writ, without directions as to the manner of its service, is not liable for torts committed by the officer in the execution of the writ, except where he, with knowledge of the facts, advises an abuse of the process, such as a trespass against the person or property of another, or subsequently ratifies such unlawful act. In such a case he will be regarded as a wrongdoer from the beginning.

TRESPASS—MEASURE OF DAMAGES.—In an action for trespass upon personal property compensation for mental suffering of the injured party is a legitimate element of damage if the unlawful act was inspired by fraud, malice, or like motives; but if the wrong consisted in the taking or destruction of personal property, without fraud, malice, or other aggravating circumstances the measure of damages is compensation for the plaintiff's loss, which is, as a rule, the value of the property, with such incidental damage as is shown to be the natural and proximate result of the act charged.

Slabaugh, Lane & Rush, and Lake, Hamilton & Maxwell, for the appellant.

John L. Carr and Frank A. Parker, for the appellee.

¶ Post, J. This is a petition in error from a judgment of the district court of Douglas county. The defendant in error, who was plaintiff below, filed in the district court the following petition:

“MAGGIE MACE, Plaintiff, }
v. }
THOMAS MURRAY, Defendant.” }

PETITION.

“The plaintiff complains of the defendant for that on the

24th day of December, 1889, and at divers other days and times before the commencement of this suit, the defendant unlawfully and with force broke and entered a certain dwelling-house of the plaintiff, situated on lot 2, block 145, in the city of Omaha, in Douglas county, Nebraska, and then and there made a great noise and disturbance therein, and staid and continued to make such noise and disturbance for two hours then next following, and then and there took and carried from said house all of the defendant's furniture and household utensils, consisting of four spring bedsteads, four mattresses, three commodes, three bedroom tables, three stoves, one lounge, ten chairs, three trunks, a large quantity of bedding, dishes, and other things, and forcibly and wantonly threw said furniture down a steep embankment into the public street and broke and injured said property, to the value of \$75. By means of which said several premises said plaintiff was, during all the time aforesaid, greatly disturbed, the property of the plaintiff of the value of \$75 was destroyed, and the plaintiff was ⁶³ prevented from carrying on and transacting her lawful and necessary affairs and business, and the plaintiff became sick, ill, and disordered, and so continued for the space of one week, and the plaintiff suffered great humiliation, anguish, and distress of mind, and has continued to do so up to the present time, to her damage in the sum of \$5,000.

"2. The plaintiff complains of the defendant for, that, on the 24th of December, 1889, the defendant unlawfully and with force broke and entered a certain dwelling-house of the plaintiff situated on lot 2, block 145, in the city of Omaha, Douglas county, Nebraska, and then and there ejected and expelled the plaintiff and her family from the possession, use, and occupation, and has kept them so ejected until the present time, whereby the plaintiff, during all said time, was deprived of the benefit of said dwelling-house, to her damage in the sum of \$50.

"3. The plaintiff complains of the defendant for, that, on or about the 24th day of December, 1889, the said defendant seized and forcibly took and carried away the following described goods, chattels, and effects, the property of the plaintiff, to wit: one white bedspread, four white sheets, one carpet, one bureau, one red carpet, one old axe, of the value of \$25, and has converted the same to his own use, and kept

plaintiff from the possession of said property until the present time, to the damage of the plaintiff in the sum of \$25.

"The plaintiff therefore prays judgment against the defendant for the sum of \$5,150 and costs of suit.

"MAGGIE MACE,
"Plaintiff."

The answer was a general denial.

The facts disclosed by the evidence are as follows: In the month of June, 1889, Mrs. Mace, the plaintiff below, leased and entered into possession of a house owned by Murray, the defendant below. On the twenty-ninth day of November following, Murray recovered judgment in a proceeding ⁶³ for the forcible detention of said property before a justice of the peace for Douglas county, and an order for a writ of restitution. On the second and tenth days of December writs of restitution were issued, which were both returned without having been served. On the twenty-fourth day of December a third writ was issued and placed in the hands of one Small, a constable, for service. On the day last named said Small, armed with the writ of restitution, visited the premises in question for the purpose of placing Murray in possession, but Mrs. Mace locked the door and refused him permission to enter. About one hour later Murray and the constable visited the premises in the absence of Mrs. Mace, and entering the house through a back door proceeded to remove the property found therein, and which acts are the wrongs alleged in the foregoing petition.

It is argued, first, that Murray incurred no liability for his acts in the execution of the writ, for the reason that he was merely called upon to assist the officer, and that whatever was done by him in the premises was under the direction and in obedience to the command of the latter. The rule we regard as settled that one who places in the hands of an officer a valid writ, without directions as to the manner of its service, will not be liable for torts committed by the latter while engaged in the execution thereof; but where he, with knowledge of the facts, advises an abuse of the process of the court, such as a trespass against the person or property of another, he will be regarded as a wrongdoer from the beginning: *Taylor v. Ryan*, 15 Neb. 573; *Hyde v. Cooper*, 26 Vt. 552; *Cooley on Torts*, 129. In this instance Murray was not satisfied apparently to trust the officer, but voluntarily assisted in the removal of the property, and now justifies

their joint action on the ground that it was necessary and proper in the execution of the writ. He is, therefore, clearly within the rule above stated, provided there was an abuse of the process, a question which will now be considered.

¶ The evidence of the plaintiff below tends to prove that Murray and the constable tore the carpets from the floor and stairs without removing the tacks, and that the window-shades were torn down without removing the fixtures. It is shown, also, that there were two or three dishes broken, and that a few knives and forks, a breastpin, and four sheets were lost. It may also be inferred from the plaintiff's evidence that the property, when removed from the house, was deposited on the bare ground and thereby slightly soiled. This evidence was contradicted by the witnesses for the defendant below, but that issue appears to have been settled by the verdict of the jury in favor of the plaintiff, and with that finding we must be content in this proceeding. In the leading case of *Jenner v. Joliffe*, 9 Johns. 384, the rule is thus stated: "And where the plaintiff, upon a process of attachment, causes an officer so to conduct himself as to misbehave in the execution of his office and produce the loss or destruction of goods in his custody, the party has his election either to sue the principal or the officer." So far as this branch of the case is concerned, we agree with the views expressed in the instructions of the district court.

The record presents for consideration a further question, the solution of which is attended with greater difficulty. It is disclosed by an examination of the petition that the amount claimed for the destruction of property is seventy-five dollars, and for property lost and carried away twenty-five dollars. While the evidence tends to sustain the foregoing allegation with respect to damage by destruction of property the highest estimate placed upon property lost is twelve dollars. It is apparent, therefore, from the verdict for sixteen hundred and twenty-three dollars and ninety cents, that it is based substantially upon the claim for "humiliation, anguish, and distress of mind." In this connection it should be observed that the proceeding for the forcible detention of the property is apparently regular and the writ of restitution in due form. Indeed, no claim was made at the trial ¶ on the ground of a want of jurisdiction or abuse of process other than as above stated, viz., that the action of the defendant below was "unlawful and with force." It must be as-

sumed, therefore, that the entry of the premises did not of itself amount to a trespass, and that all acts for which Murray is liable relate to the manner of the execution of the writ. Another fact which calls for notice is, that Mrs. Mace was not present at the time her property was removed. Her version of what transpired on that occasion best appears from her own language. In answer to the question "What conversation, if any, did you have that day with Mr. Murray?" she said, "I had in the morning he came in there. I was in the front part of the house, and I thought I heard some one in the kitchen, and I wanted to know what was there; and he said that he was going to put me out this morning, and I said, 'No, Mr. Murray,' I said, 'as soon as I get money I would pay you'; and he said no, he was going to put me right out, he said, and he commenced going around there and swearing, and I told him not to swear in the house, and he said he would, it was his own house, and he would; and he went away and he came back again in about twenty minutes. I saw him come around there with another man, and I locked the door. I would not let him in, and he kept knocking and knocking, and I never opened it; and I had a roomer upstairs, and I went and called him, and told him to come downstairs, because Mr. Murray was going to put me out; and he said, 'O, he would n't put me out,' and I said, 'Yes, he said he will,' and then he came downstairs and staid awhile, and I never opened the door to let him in. I sent the children indoors, as I was looking for them, and they come in, and they would not stay in the house. They commenced to cry, and they said they would n't stay in, so they went out, and I locked the door again, and I dressed myself after awhile and went uptown, and I went uptown and staid about half an hour, ⁶⁶ and when I came to Sixteenth and Harney I seen all my things out on the street." Other witnesses testified that she cried on discovering her property on the sidewalk, and appeared to be greatly distressed thereat; but it does not appear that she suffered insult or was subjected to personal indignity of any kind. The question is therefore fairly presented, whether the measure of damage in an action for a simple trespass to personal property includes injury to the feelings of the complaining party. The distinction must not be overlooked between cases like this, where the act charged is simply unlawful in the sense that it is a violation of the right of property, and those cases where the unlawful act was

inspired by fraud, malice, or like motives. As to those last named, the question is free from doubt. In all such cases mental suffering is a legitimate element of damage: *Day v. Woodworth*, 13 How. 363; *Cutler v. Smith*, 57 Ill. 252; *Jamison v. Moon*, 43 Miss. 598; *Brown v. Allen*, 35 Iowa, 306; *Merrills v. Tariff Mfg. Co.*, 10 Conn. 384; 27 Am. Dec. 682. But in cases of trespass, where personal property is taken and carried away, in the absence of fraud, malice, or other aggravating circumstances, the measure of damage is compensation to the plaintiff for his loss, which is, as a rule, the value of the property with such incidental damage as is shown to be the natural and proximate result of the wrong charged: *Brown v. Allen*, 35 Iowa, 306; *Wooley v. Carter*, 7 N. J. L. 85; 11 Am. Dec. 520; *Hopple v. Higbee*, 23 N. J. L. 342; *Cushing v. Longfellow*, 26 Me. 806; *Sims v. Glazener*, 14 Ala. 695; 48 Am. Dec. 120; *Woodham v. Gelston*, 1 Johns. 134; *Felton v. Fuller*, 35 N. H. 226; *Coolidge v. Choate*, 11 Met. 79; *Meagher v. Driscoll*, 99 Mass. 281; 96 Am. Dec. 759. It is believed that no precedent can be found in the reports for the allowance of damage on account of injury to feelings in actions of this character. It is certain that we have been referred to no such case, nor have we found any during a careful examination of the question. It follows that the damage awarded is excessive, and that a new ⁶⁷ trial should have been allowed on that ground; but, as we have seen, the court properly permitted a recovery for the damage actually sustained, to wit, for property destroyed, seventy-five dollars, and property carried away, twelve dollars. The defendant in error may, therefore, elect to remit all but eighty-seven dollars of the damage allowed, with interest, within thirty days, in which case the judgment will be affirmed; otherwise it will stand reversed.

Judgment accordingly. —

TRESPASS IN EXECUTION OF WRIT—DAMAGES.—If an officer, under a writ, levies upon the property of a stranger to it, he and his bondsmen are liable for the trespass: See monographic notes to *Commonwealth v. Cole*, 46 Am. Dec. 515, on what constitute breaches of official bonds of sheriffs and constables; and *Kirkwood v. Miller*, 73 Am. Dec. 141, 142, on liability of cotrespassers, and showing who are cotrespassers. The plaintiff is not liable unless he ratifies and adopts the tort of the officer, and retains or seeks to retain the benefit of it, in which case he is jointly liable with the officer. By giving the sheriff a bond of indemnity against the consequences of his known action the plaintiff ratifies the sheriff's unlawful act, and becomes jointly liable with him: See note to *Kirkwood v. Miller*, 73 Am. Dec. 142. A

sheriff, however, ought not to be liable in vindictive damages for seizing the property of a stranger to the writ where he has great difficulty in ascertaining the title to the property seized: See note to *Selden v. Cashman*, 81 Am. Dec. 96. In trespass the measure of damages is the amount of the pecuniary loss sustained by the plaintiff: See note to *Isle Royal Min. Co. v. Hertin*, 26 Am. Rep. 527. Mental suffering is a proper element of damage when it is one of the direct, proximate, and natural consequences of an actionable wrong: *Larson v. Chase*, 47 Minn. 307; 28 Am. St. Rep. 370; *Wyman v. Leavitt*, 36 Am. Rep. 306. But the rule that damages must be the natural and proximate consequence of the act complained of obviously prevents mental suffering from being considered, as a general rule, in actions concerning property: See monographic note to *West v. Western Union Tel. Co.*, 7 Am. St. Rep. 534, discussing mental anguish as an element of damages.

If an officer with process against the property of A seizes, by virtue thereof, the property of B, he is guilty of official misconduct, for which he and his sureties are liable on his official bond. Hence, if the goods of B are wrongfully levied upon and sold on an execution and attachment against A, and the plaintiff in the action against A directs the levy and sale and indemnifies the officer, he is liable with the officer and his sureties for the wrong: *Wonderlick v. Walker*, 41 Neb. 806.

LOW v. REES PRINTING COMPANY.

[41 NEBRASKA 127.]

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES—"EIGHT-HOUR LAW."

A statute declaring that a day's work for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, shall not exceed eight hours, and that for working any employee over the prescribed time the employer shall pay extra compensation in increasing geometrical progression for the excess over eight hours, is unconstitutional as being special legislation, discriminating against farm and domestic laborers, and as denying the constitutional right of parties to contract with reference to compensation for services.

CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.—If it appears that void sections of an act formed an inducement to its passage, no part of the act can be sustained as constitutional.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—RESTRICTING POWER TO CONTRACT.—The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment; and a statute which restricts a person as to either of these essential elements of the right to contract to a mode different from that enjoyed by the community at large deprives him of liberty and property without "due process of law."

CONSTITUTIONAL LAW—"EIGHT-HOUR LAW" AS A POLICE REGULATION.—

Legislation which seeks to make eight hours constitute a day's work is not justified as a police regulation, for, under the pretense of the exercise of that power, the legislature cannot prohibit harmless acts not concerning the health, safety, or welfare of society, such as a contract fixing the time and compensation for services.

Mahoney, Minahan & Smyth, for the appellant.

Ambrose & Duffie, for the appellee.

120 RYAN, C. In the district court of Douglas county plaintiff in error filed his petition, wherein were stated three causes of action. Of these the third cannot be reviewed, for the reason that there was no motion for a new trial filed or passed upon in respect to it after a trial upon evidence adduced. The stipulation waiving the motion for a new trial, and consenting that the action in this court should be treated as if such motion had actually been filed and ruled upon in the district court, ignores the consideration that is due to the trial court, where the motion in question should have been duly passed upon that whatever errors were presented thereby might be corrected. The consideration of this case, for the reason just indicated, will, therefore, be confined to the first and second causes of action stated in the petition.

121 After alleging that the defendant was a corporation doing business in the city of Omaha, the averments of plaintiff in his petition were as follows: "Further complaining, plaintiff states for his first cause of action that on the tenth day of August, 1891, he contracted with the defendant to work for it as a printer for thirty cents per hour; that pursuant to said contract he entered the employment of said defendant, and that on said tenth day of August said defendant worked this plaintiff eleven hours. Said defendant thereby became indebted to this plaintiff in the sum of six dollars and sixty cents; that is to say, two dollars and forty cents for the first eight hours worked, sixty cents for the ninth hour worked, one dollar and twenty cents for the tenth hour worked, and two dollars and forty cents for the eleventh hour worked. Of said sum thus due defendant has paid plaintiff three dollars, and no more.

"For a second cause of action plaintiff states that on the eighth day of August, 1891, he, at the request of the defendant, entered into a contract with the said defendant, which contract was in the words and figures following, viz:

"*To all employees of Rees Printing Co:*

"From and including August 1, 1891, all employees of this company will be employed and paid by the hour for the number of hours they work, at the same rate of wages now paid, and not by the day. Any employee who is willing to work the same number of hours as heretofore at the rate of wages

heretofore paid him will report in writing at once to the undersigned.

REES PRINTING Co.

"'July 30th, 1891.'

"'Receipt of the above rule and regulation is hereby acknowledged. I am willing to continue in the service of the company subject to the same.

CHARLES G. LOW.

"'August 8, 1891.'

"That the rate of compensation or wages agreed upon between the plaintiff and defendant and paid to the plaintiff by said defendant prior to entering into said contract was three dollars per day for each day worked by plaintiff, which ^{1st} day consisted of ten hours; that on said eighth day of August, 1891, the defendant worked this plaintiff ten hours, and thereby became indebted to him in the sum of four dollars and twenty cents; that is to say, two dollars and forty cents for the first eight hours, sixty cents for the ninth hour, and one dollar and twenty cents for the tenth hour worked. Of said sum thus due to the plaintiff defendant has paid three dollars, and no more."

A demurrer was filed to the above two causes of action on the grounds following:

"1. The said petition does not state facts constituting a cause of action against the defendant, nor does any of the counts thereof state facts constituting a cause of action in plaintiff's favor against the defendant.

"2. Chapter 54 of the acts of the twenty-second session of the legislature of Nebraska, under the provisions of which this action was brought, and by virtue of which plaintiff must recover, if at all, is unconstitutional and void, and in contravention of the constitution of Nebraska and of the United States.

"(a) It seeks to take away and limit the right of the citizen to enter into contracts relating to legal and lawful business.

"(b) It seeks to abridge the rights of the people in disposing of their lawful property and the purchase of the same.

"(c) It is special and class legislation, and an attempt on the part of the legislature to grant special immunities and privileges upon certain employees and employers.

"(d) The statute, while intending to be general in its operation, excepts certain of our citizens from its provisions.

“(c) It seeks to abridge the privileges of certain of our citizens and deprive them of their property without due process of law, and denies to certain of our citizens equal protection of the law, and is, therefore, in conflict with sections 1 and 2 of article 3 of the constitution of Nebraska, ¹²² and section 1 of the fourteenth amendment of the constitution of the United States.

“3. Said act is broader than the title, in so far as it provides for a penalty for violation thereof, and seeks to fix the compensation of the employee, and to that extent the provisions of the act are in conflict with section 11, article 3, of the constitution of this state.

“4. Said act is in conflict with section 5, article 8, of the constitution of Nebraska, in that it seeks to give to the employee a part of the penalty provided for its violation.”

This demurrer was argued in the aforesaid district court, Judges Wakeley, Doane, and Davis, presiding, by whom, upon due consideration, it was sustained as to said first and second causes of action. Thereupon the plaintiff electing to stand on said two causes of action, and refusing to further plead, judgment was thereon rendered in favor of the defendant. By petition in error plaintiff has duly presented for review by this court the same questions passed on in the district court.

Chapter 54, specially described in, and against which the demurrer was directed, is in the following language:

“Be it enacted by the legislature of the state of Nebraska:

“SECTION 1. That eight hours shall constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state of Nebraska, excepting those engaged in farm and domestic labor.

“SEC. 2. Any officer or officers, agent or agents, of the state of Nebraska, or any municipality therein, who shall openly violate or otherwise evade the provisions of this act, shall be deemed guilty of malfeasance in office, and be suspended or removed accordingly by the governor or head of the department to which such officer is attached.

“SEC. 3. Any employer or corporation working their employees over the time specified in this act shall pay as extra compensation double the amount per hour as paid for previous hour.

¹²⁴ “SEC. 4. Any party or parties contracting with the

state of Nebraska, or any such corporation or private employer, who shall fail to comply with or secretly evade the provisions hereof by exacting or requiring more hours of labor for the compensation agreed to be paid per day than is herein fixed or provided for, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine of not less than one hundred (\$100) dollars, nor more than one thousand (\$1,000) dollars."

The constitutional provisions with which it is claimed the above act is in conflict are: 1. The closing sentence of section 15, article 3, that "in all other cases where a general law can be made applicable no special law shall be enacted"; 2. The third section of the bill of rights, that "no person shall be deprived of life, liberty, or property without due process of law." It is also urged against the act that it is void, as an attempt by the legislature to prevent persons legally competent to enter into contracts from making their own contracts. In the present controversy there is necessarily involved the validity of the entire act, for although only the first and third sections are directly attacked, yet it is apparent, from an inspection of the act as a whole that that these two sections formed an inducement to its passage. The act must therefore stand or fall as an entirety: *Trumble v. Trumble*, 37 Neb. 340.

There seems to have been an oversight as to the first cause of action, for the averments therein were, in substance, that there was a contract of employment at the rate of thirty cents per hour; that the plaintiff was by the defendant worked eleven hours, and had received payment to the amount of but three dollars; that is, for ten hours' work at the rate stipulated. On the face of the petition there was, therefore, unpaid thirty cents upon the first cause of action. This has not been insisted upon in argument, however, and will therefore receive no further attention.

The second cause of action avers that there was a written ¹³⁵ agreement between the parties that after August 1, 1891, employment should be by the hour at the rate of three dollars for ten hours' work; that is to say, plaintiff was to receive thirty cents per hour, but he agreed to work each day ten hours. It is alleged that on August 8, 1891, plaintiff worked ten hours and had been paid therefor three dollars. According to the terms of the agreement between the parties the plaintiff, by the payment of three dollars, had received all

that was his due. By virtue of the provisions of section 3 of the act under consideration it is insisted, however, that for the ninth hour plaintiff is still entitled to receive thirty cents, and for the tenth hour he is yet entitled to ninety cents. This clearly presents the question whether a contract fairly entered into, and in compliance with which both parties have acted to the full discharge of their obligations thereunder, must be deemed modified by the existing provisions of the statute, irrespective of the intention of the parties as expressed in their contract.

Until a comparatively recent period it would have been quite difficult to find adjudications pertinent to the legal propositions involved. For some reason, not necessary to consider, there has in modern times arisen a sentiment favorable to paternalism in matters of legislation. The outgrowth of this sentiment has been legislation for the regulation of the media of payment, the manner in which products shall be measured or weighed when compensation depends upon measure or weight, the hours of labor, and other kindred subjects. In each instance the statutory provision is necessarily a restriction of the right to regulate relations and duties by contract. To the fact that these attempts have recently been so frequently made, we are indebted for a number of well-considered adjudications bearing upon the questions now presented for our determination. While there has not been entire unanimity, the decided weight as well as the number of authorities are coincident with those from which quotations will hereafter be ¹³⁶ made. That these quotations are freely made requires no other apology than that the cases quoted from are so ably and carefully considered that to them we should be hopeless to make any additions or improvement by the most careful research of which we are capable. The three several objections to the act under consideration will be taken up in the order of their statement, and considered rather in the light of authority than in that of original reasoning or research.

1. The first section of the statute under consideration provided what number of hours should constitute a legal day's work for all classes of laborers except those engaged in farm or domestic labor. The argument made in favor of the necessity that each day the excess over eight hours should be devoted to rest, recreation, and mental improvement loses much of its force when these very desirable benefits are by

the statute itself restricted to certain defined classes of laborers, no one of which, independently of the statute, devotes so many hours to labor as do the classes denied the protection of the statute. Legislation of this kind is always fraught with danger, hence arose the prohibition of special legislation when avoidable which is found in our constitution. In *State v. Loomis*, 115 Mo. 307, we find an opinion of the supreme court of Missouri, one judge alone dissenting, of which the syllabus is as follows: "Revised Statutes of 1889, sections 7058-7060, making it unlawful for any corporation, person, or firm engaged in manufacturing or mining to issue for the payment of wages any order, check, or other token of indebtedness, payable otherwise than in lawful money, unless the same is negotiable and redeemable at its face value in cash or in goods, at the option of the holder at the store or other place of business of the corporation, person, or firm, without placing similar restrictions on others employing labor, is unconstitutional as class legislation." In the majority opinion which was filed March 25, 1893, class ¹⁸⁷ legislation is ably discussed in the following language:

"There is no doubt but many of our legislative enactments operate upon classes of individuals only, and they are not invalid because they so operate, so long as the classification is reasonable and not arbitrary. Thus, it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property and the safety, health, and morals of the citizen; but classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus, the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and, therefore, not the law of the land. When speaking upon this subject Judge

Cooley says: 'The doubt might also arise whether a regulation made for any one class of citizens entirely arbitrary in its character, and restricting their rights and privileges or legal capacity in a manner before unknown to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended, like the want of capacity in infants and insane persons; and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to build such houses as others ¹³⁸ were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid an individual or a class the right to the acquisition and enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness; and those who shall claim a right to do so ought to be able to show specific authority therefor instead of calling upon others to show how and where the authority is negatived': Cooley's Constitutional Limitations, 6th ed., 484. There can be no doubt that the legislature may regulate the business of mining and manufacturing so as to secure the health and safety of the employees, but that is not the scope of the two sections of the statute now in question. They single out those persons who are engaged in carrying on the pursuits of mining and manufacturing, and say to such persons: 'You cannot contract for labor payable alone in goods, wares, and merchandise. The farmer, the merchant, the builder, and the numerous contractors employing thousands of men, may make such contracts, but you cannot.' They say to the mining and manufacturing employees: 'Though of full age, and competent to contract, still you shall not have the power to sell your labor for meat and clothing alone as others may.' It will not do to say these sections simply regulate payment of wages, for that is not their purpose. They undertake to deny to the persons engaged in the two designated pursuits the right to make and enforce the most ordinary, every-day contracts, a right accorded to all other persons. This denial of the right to contract is based upon a classification which

is purely arbitrary, because the ground of the classification has no relation whatever to the natural capacity of persons to contract."

¹³⁹ After the above expression of its views the supreme court of Missouri reviewed the authorities bearing upon the question discussed. This review we shall quote, because therein is contained a condensed statement of the purport of numerous decisions which tend to enlighten the subject under discussion. The language in which this review was made is as follows:

"The supreme judicial court of Massachusetts had under consideration in *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, a statute which provides that 'no employer shall impose a fine upon, or withhold the wages or any part of the wages of an employee engaged at weaving, for imperfections that may arise during the process of weaving.' It was held that if the act went no further than to forbid the imposition of a fine for imperfect work it might be sustained, but that the attempt to make inferior work answer a contract for good work presented a different question; that the right to acquire, possess, and protect property includes the right to make reasonable contracts which shall be under the protection of the law. Says the court: 'If it [the statute] be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business which the constitution guarantees to every one when it declares that he has a natural, inalienable right of acquiring, possessing, and protecting property.'

"*Godcharles v. Wigeman*, 113 Pa. St. 431, was an action brought by Wigeman to recover wages as a puddler. Plea of payment, etc. During the time of his employment the plaintiff asked for and received orders from defendants on different parties for coal and other articles, which orders were honored by the parties on whom ¹⁴⁰ drawn, and the defendants paid them. It seems an act of the legislature made all orders given by employers engaged in the business of manufacturing to their workmen, payable in goods or any thing but money, void. Speaking of these sections of

the act the court said: 'They are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the legislature to do what in this country cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The act is an infringement alike of the right of the employer and the employee. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.'

"In *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, a statute of that state prohibited persons engaged in mining and manufacturing from issuing orders in payment for labor except as such should be made payable in money. It made a violation of its provisions a misdemeanor. The constitution of that state declares that all men have certain inherent rights; that is to say, 'the enjoyment of life and liberty with the means of acquiring and possessing property and of pursuing and obtaining happiness and safety.' The statute was held unconstitutional after a full consideration. Says the court: 'The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the constitution.' The scope of the opinion is well summarized in the head note in these words: 'It is not competent for the legislature under the constitution to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear the burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers ¹⁴¹ of labor to make.' And this ruling was followed and approved in *State v. Fire Creek Coal & Coke Co.*, 33 W. Va. 188; 25 Am. St. Rep. 891.

"The statute brought in question in *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, required all coal produced in the state to be weighed on scales to be furnished by the mine-owners, and subjected the mine-owner to fine or imprisonment for a failure to comply with its provisions. By another section it was provided 'that all contracts for the mining of coal in which the weighing of coal as provided for in this act shall be dispensed with, shall be null and void.' It was held that the mine-owners could not be compelled to make their

contracts for mining coal so as to be regulated by weight; and that they could not be compelled to keep and use scales for such purposes, save when they saw fit to make contracts for mining on the basis of weight. The law was considered repugnant to the constitutional provision that 'no person shall be deprived of life, liberty, or property without due process of law'; that to single out coal-mine owners and prohibit them from making contracts which it was competent for other employers of labor to make was not due process of law. And for like reasons the same court held an act void which denied to persons and corporations engaged in mining and manufacturing the right to keep or be interested in a truck-store for furnishing supplies, etc. *Frerer v. People*, 141 Ill. 171."

The opinion above quoted from reversed the judgment of the second division of the same court reported in 20 S. W. Rep. 332, by which division it had been referred to the full bench for determination.

In *State v. Sheriff of Ramsey County*, 48 Minn. 236, 31 Am. St. Rep. 650, the supreme court of Minnesota filed an opinion on January 19, 1892, in which was used this language: "In *Nichols v. Walter*, 37 Minn. 264, it was held that the law was general and uniform in its operation which operates equally upon all the subjects ¹⁴² within the class for which the rule is adopted, but that the legislature cannot adopt an arbitrary classification, though it be made to operate equally upon each subject within the class; and the classification must be based on some reason suggested by such a difference in the situation and circumstances of the subjects placed in different classes as to disclose the necessity or propriety of different legislation in respect to them. In *State v. Donaldson*, 41 Minn. 74, a distinction or classification of dealers in medicines, based on the location of their places of business in respect to distance from drug-stores, was held reasonable and not a mere arbitrary distinction. In *Johnson v. St. Paul etc. R. R. Co.*, 43 Minn. 224, this court, in dealing with chapter 13, Laws of 1887, defining the liability of railway companies to their employees, said, in substance, that not only must the statute treat alike, under the same conditions, all who are brought within it, but in its classifications it must bring within it all who are under the same conditions. 'Such law must embrace all and exclude none whose condition and wants render such legislation necessary or appropriate to them as a class': *Randolph v. Wood*, 49 N. J. L. 88. . . . No arbitrary distinction

between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing or is applied to other uses, as a grain-elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable."

There is perceived no reason why a resort to special legislation was necessary in respect to the subject matter ¹⁴³ of the act with which we are now dealing. If we are correct in this assumption the language quoted is specially applicable to the provisions of the statute by which its benefits are withheld from domestic and farm laborers. These views are enunciated with somewhat more of confidence because they are in line with the reasoning of this court in *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356.

2. The third section of article 1 of the constitution of this state provides that "no person shall be deprived of life, liberty, or property without due process of law." What is implied by the term "due process of law" is a question which has received discussion by this court. In *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37, 29 Am. Rep. 356, it was held, in the language of the first paragraph of the syllabus, that "legislative authority cannot reach the life, liberty, and property of the individual, except when he is convicted of crime, or when the sacrifice of his property is demanded by a just regard for the public welfare." In the discussion of the principles involved in the case, from which the above quotation of the first paragraph of the syllabus was taken, Gantt, J., delivering the opinion of this court, said: "The terms 'due process of law' and 'the law of the land'—one or the other of which is found in all constitutions of the states—are said to mean the same thing; and it is quite clear that they are indifferently used in constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government: *State v. Doherty*, 60 Me. 509; *Norman v. Heist*, 5 Watts & S. 171; 40 Am. Dec. 493; *State v. Simons*, 2 Spears,

767. Hence these terms do not mean merely a legislative enactment, for, 'if they did, every restriction upon the legislative authority would be at once abrogated. For what more can a citizen suffer than to be taken, imprisoned, disseised of his freehold, liberties, and privileges; be outlawed, exiled, and destroyed; and be deprived of his property, his liberty, and ¹⁴⁴ his life, without crime. Yet all this he may suffer, if an act of the assembly, simply denouncing these penalties upon particular persons, or a particular class of persons, be in itself the law of the land within the sense of the constitution': *Hoke v. Henderson*, 4 Dev. 1; 25 Am. Dec. 677. Webster interprets these terms to mean 'that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment is not, therefore, to be considered as the law of the land'; and, he says, 'if this were so, acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in every possible form would be the law of the land. There would be no general, permanent law for the courts to administer or even to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, and not to declare the law or administer the justice of the country': 5 Webster's Works, 487; *State v. Doherty*, 60 Me., 509; *Holden v. James*, 11 Mass. 404; 6 Am. Dec. 174; *Lane v. Dorman*, 3 Scam. 240, 241; 36 Am. Dec. 543; *Commonwealth v. Bryne*, 20 Gratt. 165; *Bank of Columbia v. Okely*, 4 Wheat. 243. It is, however, true that, subject to the qualified negative of the governor, the legislature possesses all the legislative power of the state; but, as it is said in *Taylor v. Porter*, 4 Hill, 144, 40 Am. Dec. 274, 'under our system of government the legislature is not supreme. It is only one of the organs of absolute sovereignty which resides in the whole body of the people,' and, therefore, as the 'security of life, liberty, and property lay at the foundation of the civil compact, to say that the grant of legislative power included the right to attack private property would be equivalent to saying that the people had delegated to their servants the power of defeating one of the great ends for which government was established': Smith's Constitutional Law, 484. This one great end of government ¹⁴⁵ is the protection of the absolute right of individuals—the life, liberty, and property of each.

citizen of the state." In *State v. Loomis*, 115 Mo. 307, the term "due process of law" was discussed and applied to subjects kindred to those now under consideration. The court of appeals of Texas, in an opinion filed June 25, 1892, and found in *San Antonio etc. Ry. Co. v. Wilson*, 19 S. W. Rep. 910, cites with approval the case of the *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356. Immediately following and enforcing their approval was a full review of the same subject as had been discussed by Judge Gantt, with a synopsis of the holdings of numerous courts with reference thereto. The length of this opinion forbids an extended quotation from the opinion to which reference has just been made, but its examination will be found to further illustrate and enforce the principles laid down in *Atchison etc. R. R. Co. v. Baty*, 6 Neb. 37; 29 Am. Rep. 356. The special practical application of the principles to which we have just referred refer to the alleged attempt to deprive parties of the right to contract as they see fit, and will, therefore, be treated under that head.

3. In *Braceville Coal Co. v. People*, there was filed October 26, 1893, by the supreme court of Illinois, an opinion, reported in 147 Ill. 66, 37 Am. St. Rep. 206, in which was the following language: "There can be no liberty protected by government that is not regulated by such laws as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints necessary to secure the same right to all others. The fundamental principle upon which such liberty is based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such a vocation or calling as he may ¹⁴⁶ choose, subject only to the restraints necessary to secure the common welfare: *Frorer v. People*, 141 Ill. 171; *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465; *Live Stock etc. Assn. v. Crescent City etc. Co.*, 1 Abb. U. S. 388; *Slaughter House Cases*, 16 Wall. 36; *Godcharles v. Wigeman*, 113 Pa. St. 431; *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863. Property, in its broader

sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it; and the right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage; and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. We need not extend this opinion by further discussion. The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either, as the same is enjoyed by the community at large, is deprived of liberty and property."

For a further discussion of these propositions reference is made to the case entitled *Application of Jacobs*, 98 N. Y. 106; 50 Am. Rep. 636. A complete review of the authorities upon this point will be found in *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109, in which the opinion of the supreme court of Arkansas was filed February 23, 1894. It is the latest case which has come under our observation ¹⁴⁷ and is strictly in line with those above quoted from and cited as to the questions under consideration.

A full and careful examination of all the questions presented has satisfied us that sections 1 and 3 of the act discussed are unconstitutional for the reasons above assigned. The legislation attempted cannot be defended as a police regulation, as was attempted in argument, for, under pretense of the exercise of that power, the legislature cannot prohibit harmless acts which do not concern the health, safety, and welfare of society: *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171; *State v. Loomis*, 115 Mo. 307; *Ex parte Kuback*, 85 Cal. 274; 20 Am. St. Rep. 226; *Application of Jacobs*, 98 N. Y. 106; 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465. The

claim that this act was a proper exercise by the legislature of its police power cannot be sustained. It results that the judgment of the district court is affirmed.

STATUTES—CONSTRUCTION OF.—If a statute is void in some of its provisions, but valid in others, the whole statute will fall if the various provisions are so intermingled and mutually dependent one upon the other as to raise the presumption that the legislature would never have passed the statute unless it believed the whole could stand as valid and constitutional: See note to *State v. Deal*, 12 Am. St. Rep. 219.

CONSTITUTIONAL LAW—POLICE POWER.—No general power resides in the legislature to regulate private business, prescribe the conditions under which it shall be conducted, fix the prices of commodities or services, or interfere with freedom of contract: *People v. Budd*, 117 N. Y. 1; 15 Am. St. Rep. 460.

KOFKA v. ROSICKY.

(41 NEBRASKA, 323.)

SPECIFIC PERFORMANCE IS A MATTER OF DISCRETION in the court which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties.

SPECIFIC PERFORMANCE TO PREVENT FRAUD.—If an oral contract, partly performed by one party and wholly by the other, has the elements of certainty, and is established by clear and satisfactory proof, a court of equity will decree a specific performance of it if nonfulfillment would amount to a fraud on the one who has performed his part.

ADOPTION—SPECIFIC PERFORMANCE OF CONTRACT—AGREEMENT TO MAKE ADOPTED CHILD AN HEIR.—If a young child is given by its parents to its uncle and aunt to be as their own, under an agreement to adopt and rear it, to nurture and educate it, and, at their death, to leave it all their property, and it takes their name, not knowing its own father and mother, but recognizing its uncle and aunt as such, and lives with them for a number of years, and until they die possessed of real property which they do not either by deed or will transfer to it, there is such a part performance by the parties as will entitle the child to a decree giving it the title to the property, by way of specific performance of the contract.

Switzler & McIntosh, for the appellant.

Mahoney, Minahan & Smyth, for the appellee.

323 HARRISON, J. December 8, 1888, the following petition was filed in the district court of Douglas county.

"The plaintiff, Josephine Kofka, appears by her next friend, James Kofka, and for her cause of action alleges the fact to be that this plaintiff was born in Omaha, Nebraska

on the sixteenth day of March, 1877; that her father's name is James Kofka, who appears here as her next friend, and her mother's name is Mary Kofka, both of whom were then residing in Omaha, and have ever since here resided; that the parties to this suit are all of Bohemian nationality; that soon after her birth, to wit, in the month of August, 1878, there were living in Omaha, John Spilinek, deceased, and his wife, Anna Spilinek, the latter being a sister of the plaintiff's mother. During said month the said John Spilinek and Anna Spilinek, who never had any children of their own, requested of plaintiff's parents the privilege of taking this plaintiff with them to live with them as their child. The parents of plaintiff having several children, one of whom at that time was only a few weeks old, fully considered the matter, and having full confidence that plaintiff would receive at the hands of John and Anna Spilinek the care and affection which is due from parents to child, consented to said request, but only upon the expressed and well-understood conditions, to be hereinafter named; that is to say, James Kofka and Mary Kofka, the parents of the plaintiff, gave up the care, custody, and control of said child, in the said month of August, 1878, on the consideration and agreement, then and there assented ²²⁴ to by the said John and Anna Spilinek, that they would legally adopt and receive the said child as their own, would care for her, rear and educate her, and that she should have their fullest and best affection, and at their death she, the plaintiff, should inherit and be left all the property with which they died possessed.

"Plaintiff further says that she went to live with the said John and Anna Spilinek at the time above mentioned, on the terms aforesaid; that she continued to live uninterruptedly with them until their death, which came to John Spilinek on September 16, 1888, and to Anna Spilinek on September 19, 1888. The plaintiff says that during all of said time she conducted herself toward the said Spilineks as an affectionate and obedient child and received at their hands all the devotion and love a child should receive from parents; that she had, for several years previous to their death, assisted her aunt, Anna Spilinek, in the work about the house, in the way of washing, making up the beds, house-cleaning, going on errands, and generally doing at their request any thing within her power; that she has of late years been going to the public schools of the city of Omaha, where she was always

enrolled and known as Josephine Spilinek, and, in fact, she has always gone by that name, and never knew any other until the death of the said John and Anna Spilinek. Plaintiff says the said John and Anna Spilinek always called her their own child, and so treated her, and she was told and given to understand by them that her own father was her uncle and her own mother her aunt, and she knew not the contrary until after September 19, 1888, and she always believed, and in her own mind cannot but believe yet, that the said John and Anna Spilinek were her real father and mother.

“The plaintiff further says that the said deceased, John Spilinek and Anna Spilinek, often, during the last ten years, expressed and made known to friends and acquaintances, and to the plaintiff's parents, their intention to leave ²³⁵ this plaintiff all their property at their death, and these promises and declarations on the part of both were made up to and within a few days of and on the very day of their death, and plaintiff says that up to the very time of their death they intended to leave their property to this plaintiff; that the said deceased always intended to fulfill their agreement of adoption by legal proceedings according to the statutes, but all parties concerned were on intimate and friendly terms, and the matter was allowed to go by, all feeling secure, and that for all intents and purposes plaintiff was as fully their child as if the formalities had been gone through, until it was finally prevented by his sudden death as hereinafter mentioned.

“Plaintiff further says that on the sixteenth day of September, 1888, the deceased John Spilinek was suddenly overtaken by a loss of control of his mental faculties and while thus afflicted shot himself dead, and inflicted mortal wounds at the same time upon his said wife; that John Spilinek died within a short time on the same day, but his said wife Anna lingered until September 19, 1888, when she died from the effects of said wounds. Plaintiff says there was no marital or family difficulty whatever to induce this conduct on the part of said John Spilinek, but it was wholly caused by despondency, brought on by fancied business embarrassments.

“Plaintiff says that the deceased John Spilinek died intestate, but had it not been for his sudden act of suicide, he would have made provision by will for his property to go to

his wife during her life, and, at her death, to this plaintiff, as was his oft-expressed desire and intention up to the very time of his death.

"Plaintiff alleges that Anna Spilinek, deceased, while in the full and complete control of her mental faculties, and recalling her deceased husband's desire in the premises as well as their agreement, did on September 17, 1888, make and execute a will in writing, which said will was duly ³²⁶ probated and allowed on the twentieth day of November, A. D. 1888, by the terms of which all the real and other property of which she died possessed, subject to two or three small debts, was left to this plaintiff, whom she calls therein, 'our adopted child, Josepha Kofka.' The following is a copy of said will:

" 'LAST WILL OF

" 'I, Anna Spilinek, of Douglas county and state of Nebraska, being aware of the uncertainty of life, but of sound mind and memory, do make and declare this to be my last will and testament in manner following, to wit: I give, devise, and bequeath unto our adopted child, Josepha Kofka, all of mine real estate, money, personal property, and other effects that I may be possessed of or entitled to after my decease, subject, however, to all my legal debts; that is to say, I and my husband owe to Karel Spilinek \$150, and to John Barta \$50, and to Barbara Spilinek \$9. I also further declare that out of the above real estate and money \$100 be set and given to my father, Frank Radil. Signed this 17th day of September, 1888, at Omaha, Nebraska.

" 'ANNA SPILINEK.

" 'Signed in the presence of

" 'James Engelthale,
" 'Frank Mrkwicka,
" 'Vaclav Benak.'

"The plaintiff says that the defendant John Rosicky is the duly appointed, qualified, and acting administrator of the estate of the said John Spilinek; that the other defendants named, to wit, Anton Spilinek, Frank Spilinek, Vincent Spilinek, and Albert Spilinek, being of ages, respectively, fifty-three, fifty-one, forty-nine, and forty-two years, are brothers of said John Spilinek, deceased; that they are all nonresident aliens, living at Skuhrov, Bohemia, except Anton, and he is a resident and citizen of Nebraska.

"Plaintiff alleges that the defendant Anton Spilinek,

claims to be the sole heir at law of the estate of John ³³⁷ Spilinek, his brothers being nonresident aliens, and disputes the right of this plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that this plaintiff has no rights in the premises. The other brothers are made defendants in this case and brought into court out of caution, in view of our present law with respect to nonresident aliens.

"The plaintiff says that at the time of his death the deceased John Spilinek was possessed of the following real estate, situated in the city of Omaha, of the value of about six thousand five hundred dollars; that is to say: The east half of lot 4, in block 11, and the east half of the west half of lot 4, in said block 11, S. E. Rogers' addition to Omaha, Nebraska. The defendant Herman Tombrinck claims a mortgage on the property described herein for six hundred dollars, bearing date May 4, 1887, which appears of record in Douglas county as a lien on said property, but whether the same is genuine or unpaid this plaintiff has no information, and in order to put said Herman Tombrinck to his proof in the premises, she denies said mortgage is *bona fide* and valid lien on said property.

"The plaintiff says that since she and her parents have fully performed the agreement herein mentioned on their part, whereby they yielded the possession of and control over this plaintiff to said deceased parties, and she yielded to them the obedience, services, and devotion of a child for over ten years, and would have continued so to do but for their death, and that by their own acts during their lives she knew no other mother or father save them, and that whereas these decedents fully expected and intended she should inherit their property at their death, plaintiff says it would be a fraud on her and on them to have their agreements in that particular violated. The plaintiff therefore brings her cause before this honorable court on its equity side, and prays that she may be decreed a specific performance ³³⁸ of the contract mentioned herein, and that she be declared to be the lawfully adopted child of the deceased John and Anna Spilinek; that she may be declared the legal heir to the property described herein, and all other property of said deceased, and to hold the same free from any claim or right the other defendants may have or claim in or to the same, and for such

further relief in the premises as the facts in the case may entitle her."

We copy the allegations of the petition entire, for the reason that it is probably as short and complete a statement of the plaintiff's cause of action as can be made and fully set forth the same. A demurrer to the petition was filed, argued, and overruled, and the answer, filed by defendant March 7, 1890, which joined the issues upon which the case was tried and determined, contained two counts, the first of which was as follows:

"Now comes the said defendants, John Rosicky, administrator, Anton Spilinek, Frank Spilinek, Albert Spilinek, Vincent Spilinek, and, answering for themselves only, deny each and every allegation in the petition filed in said cause except those expressly admitted herein.

"Defendants admit that plaintiff was born in Omaha, Nebraska; that her father's name was James Kofka and her mother's name Mary Kofka, and that both of them were residing in Omaha when the said plaintiff was born; that the parties to this suit are of Bohemian nationality; that the said plaintiff lived with the said John Spilinek, deceased, for some years; that in 1878 John Spilinek and his wife, Anna Spilinek, a sister of plaintiff's mother, resided in Omaha; that said John Spilinek and Anna Spilinek never had any children of their own; that plaintiff resided with the said John Spilinek and Anna Spilinek at the time of their death, and that John Spilinek died on September 16, 1888, and Anna Spilinek on the nineteenth day of September, 1888; that the said plaintiff has of late years attended the public schools of the city of ~~329~~ Omaha; that on the sixteenth day of September, 1888, the deceased John Spilinek was afflicted by a loss of control of his mental faculties, and while thus afflicted shot himself dead, and inflicted a mortal wound at the same time upon his said wife; that the said Spilinek in a short time died and his said wife lingered until September 19th, when she died from the effects of said wound; that there was no marital or domestic difficulty whatever to induce this conduct on the part of the said James Spilinek, but was wholly brought on by fancied business embarrassments; the deceased died intestate; that the will, a copy of which is set out in the petition, was signed by Anna Spilinek; that the defendant John Rosicky is the administrator of the estate of said John Spilinek, as alleged in the petition; that the other defend-

ants, Anton Spilinek, Frank Spilinek, Albert Spilinek, and Vincent Spilinek, are brothers of the deceased, as set out in the petition; said brothers are all nonresidents except Anton Spilinek, and that he is a resident of the state of Nebraska; that said Anton Spilinek claims to be the sole heir at law of the estate of John Spilinek, and denies the right of the plaintiff to inherit any property whatever from the estate of the said John Spilinek, and he claims to be the sole heir to the real estate mentioned herein, and maintains that said plaintiff has no right to the premises; that the deceased John Spilinek was possessed of the real estate described in the petition at the time of his death, and that the defendant claims a mortgage upon said premises, as alleged in said petition.

“Further answering defendants say that they have no knowledge or belief concerning the date of plaintiff’s birth, nor concerning the allegation that she continued to live on uninterruptedly with the said deceased until their death; nor that she conducted herself toward the said deceased as an affectionate and obedient child and received from the hands of the deceased all the love and devotion that she should receive from her parents; nor that she had, for several ~~240~~ years previous to the death of the deceased, assisted in the work about the house as alleged in said petition, nor that she was enrolled in the public schools as Josephine Spilinek, and that she was always known by that name, and never knew any other until the death of the deceased; nor that said deceased called her their child.”

The second count of the answer pleads the statute of frauds. The trial of the case, as regards the rights of the plaintiff, was had July 17, 1891, and the issues were determined in favor of defendants and the action of plaintiff dismissed, and the case brought to this court on appeal by plaintiff.

The evidence in this case discloses that the mother of the plaintiff, Mary Kofka, was the sister of Mrs. Spilinek; that they were living near each other in the city of Omaha, with their husbands, John Kofka and John Spilinek. The Kofkas were the happy possessors at the time (August, 1878) when it is alleged the transaction occurred between them out of which this suit springs or to which we may refer as its source, of four children, among them the plaintiff, then about seventeen months old. The Spilineks had no children, and it was agreed between the parties that the

plaintiff should be taken by the Spilineks, to be reared, educated, and cared for as if she was their own daughter—they stating that any property they might have or own during life should be given to her, or be hers, at their death, and that they would adopt her and make her their heir. Pursuant to this agreement the plaintiff was taken to the house of the Spilineks, who, at the time of these occurrences, were poor, and, as appears from the testimony, living in a shanty in the street. The plaintiff, from this time until the death of the Spilineks—of whom John Spilinek died September 16, 1888, having on that day shot first his wife and then himself, he dying immediately and she two or three days later—lived with the Spilineks and was taught to and did call them father and mother, and ³⁴¹ treated them as such, and did not know her own father and mother, although she saw them almost, and possibly, every day, but accepted them as, and considered and called them, aunt and uncle, knowing no better, yet she went to the premises where they resided and played with their other children; thinking they were her cousins, and treating them as such; that she did not know but what the Spilineks were her parents until after their death, when she was so informed by her mother and other parties. The plaintiff was known at school as “Josie,” or “Josephine Spilinek,” and so wrote her name at all times after she learned to write. In fact, there seems to have been a complete loss of her identity, personality, or individuality as a Kofka, and an assumption of the Spilinek, as much so, apparently, as if her whole being, both mental and physical, had been changed. The evidence further shows that she was a good, obedient, and dutiful child to the Spilineks, and also that they treated her well and affectionately. At all times, in all places, and under all circumstances, Spilinek and his wife treated, looked upon, claimed, and acknowledged the plaintiff as their “child” or “girl.” The Kofkas, on their part, never made any claim to her or her services, or attempted to take her from the Spilineks, or by word or deed to inform her that they bore any other relation to her than that of uncle and aunt; and through all this was interwoven, as a part of the life and vitality of the agreement, the proposition that the plaintiff was to have the property. It was always spoken of when the matter was mentioned between them, which was very frequently, and the Spilineks made it a subject of conversa-

tion with a number of persons, friends, and acquaintances, some of whom were called and so testified; and in a letter written by Spilinek, September 12th, we find reference made to "my girl," which must be taken to mean the plaintiff, and in the will of Mrs. Spilinek, made just prior to her death, she fully recognized the position and rights of the plaintiff.

³⁴³ We are satisfied, after a careful examination, comparison, and analysis of all the testimony in the record, that the contract was one clear and definite in its terms and obligations, and was both made and performed as such with reference to the property rights to accrue or inure to or in favor of plaintiff as much as with reference to any other portion of it.

The Spilineks had acquired some property, a piece of real estate, the title to which is now in controversy in this case, for which, according to the evidence, Spilinek was at one time offered four thousand dollars. There was also an agreement to adopt the plaintiff, or at least so the parties testify, and the parents and Spilineks often conversed about "assigning" her, but it does not seem to have been considered by them as one of the essentials of the compact, and which must necessarily be accomplished, but as something more of a formal nature or character; nor do we think it was so inseparably connected with the other part of the contract as to carry it along with it and render it incapable of enforcement, if so capable in any event, provided the agreement to adopt cannot be decreed to be performed, which we think unquestionably it cannot be as in this state the matter of adoption is statutory, and the manner of procedure and terms are all specifically prescribed and must be followed, and involve a written consent by the parties, a relinquishment by those possessing the rights to and over the child, and an acceptance by the person or persons desiring to acquire such rights and a decree by the judge of the county court, which introduces an element barring the jurisdiction of a court to decree specific performance in the first instance.

Having reached the conclusion that a contract was entered into, the query now arises, Was it one of which a court of equity can and will decree a specific performance? The property which the plaintiff seeks to recover is real estate, and it is contended that the contract, resting entirely ³⁴³ in parol, is within the statute of frauds, and hence cannot be enforced. Courts in the past (whether such action was

wise or unwise we will not now stop to discuss) have removed or exempted from the operation of the statute of frauds certain cases in which they have concluded that the hardship forced to be endured by the parties was greater than was warranted by the benefit to be derived from enforcing the rule, and there has gradually arisen classes of cases known as "exemptions from the rule of the statute," and one class embraces what is called "cases of specific performance of parol contracts for the transfer or conveyance of real estate." The agreement in this case did not contain any thing by which it can be known whether the transfer of the property to plaintiff was to be effected by will or by deed, and our inquiry in reference to the power of the court to decree performance cannot be confined to either, but must include both. There is a line of authorities emanating from some of our able courts of last resort, most notably those of Indiana, Illinois, and Iowa, which denies the right to specific performance of a contract similar to the one under which the claim in this case arises, mainly upon the ground that the statute was enacted to cover just such cases; that it will work no hardship to require parties to put all such agreements in writing, and that the testimony of witnesses should not be received, probably several years after the happening of the event, to establish a contract by parol, by which the course of the descent of lands will be changed. These are strong and cogent reasons, and it is not our province to attack or attempt to refute them. As we understand it, they are the underlying principal reasons for the rule as embodied in the statute; but we do not think the rule should be so rigidly adhered to as to accomplish a fraud as against one of the persons affected by the contract to which it is to be applied. It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of ³⁴⁴ each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties: 2 Story's Equity Jurisprudence, sec. 742; *Clarke v. Koenig*, 36 Neb. 572.

Van Dyne v. Vreeland, first reported in 11 N. J. Eq. 370, and on a second hearing, was a case in which "the father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect, that the uncle should take the infant and adopt him as his own child, and that he would treat him as his own son, and that the prop-

erty he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child and had him baptized, and the child assumed his surname, and lived with him twenty-five years. Held, that the child might maintain his bill upon the agreement after such performance." Also, "Where a father makes an agreement in reference to his infant child, from which benefits are to accrue to the child upon his performance of the agreement, after performance the child, in his own name, may file his bill to enforce the agreement. The party for whose benefit the agreement is to be performed, and especially if any valuable portion of the consideration has been rendered by him, has a legal right to enforce it. It is of no consequence that the promise to fulfill it was not made directly to the person who is entitled to remuneration. It is enough if it was made by some one who had authority to make it on his behalf." In the text of the opinion it was stated: "In this case, if the agreement, which is the ground of the bill, is of such a character as could be enforced by either party if it were in writing, then, I think, there can be no doubt but that there has been such a part performance in this case by the complainant as will take the agreement out of the operation of the statute. The bill alleges that the agreement has been fully performed by the father of the complainant, one of the parties by whom it was made, and by the complainant, ²⁴⁵ upon whom it imposed certain duties and obligations. The facts stated show that the complainant and his father have performed their part of the agreement as fully as such an agreement could be performed. There is nothing more for them to do. The complainant cannot be denied his redress by the mere interposition of the statute. The question is, Is it an agreement of a character which can be enforced in equity"? In the report of the case in volume 12 it was held: "The principles of equity will be applied to new cases as they are presented, and relief will not be withheld merely on the ground that no precedent can be found." In the opinion the court says: "The agreement was this: Vreeland and his wife were to adopt the boy. He was to be given up to them, and to be under their management and control, and when they died he was to have their property. It is true the agreement does not state whether the property should be secured to the complainant by deed, so that he might enjoy it when

they died, or whether it should be left him by will. . . . In this case part performance is set up in avoidance of the statute. I think the answer admits, and the evidence shows, a substantial performance of the agreement on the complainant's part, as well as such part performance on the part of the defendant himself as will take the case out of the operation of the statute. There has been such a performance on both sides as puts the complainant in a situation which is a fraud upon him unless the agreement is fully performed." This was a case very similar in its facts and incidents to the one at bar and directly in point.

The case of *Van Tine v. Van Tine*, 15 Atl. Rep. 249, is another case decided by the New Jersey court in September, 1888. The case is stated and the rule announced in the first section of the syllabus as follows: "A father gave his child, then only a few months old, to S., his sister, with a mutual understanding that she was to provide for the child and bring her up as her own. She thereupon took charge of the child, refused ²⁴⁹ to give her up to her father, and had her baptized in her own name, by which the child was always known. The child always lived with S., assisted her in her household duties, called her 'mother,' and was not informed of her parentage until she was eighteen years old. S. often stated that the child was to have all her property, and about fourteen years before her death made a will, bequeathing to the child all her personal property, at which time she owned none but personal estate. But a few months before her death she purchased the land in question. Her death was sudden, and there was nothing to show that she bought the land to prevent that much of the estate going to the child. Held, that the child was entitled to the land, as the agreement of S. to receive her as her own was valid and binding, though not in writing, and had been partially performed." In the opinion the court said: "The obligations of parties to each other are ascertained as well by what they say as by what they do; admissions often giving the best and truest interpretation to contracts previously entered into; or doings showing what has previously been agreed to be or promised should be done. When Mrs. Stryker, being childless, said to her brother Peter, the father of Jessie, that she would take Jessie, and would treat her as her own child, she meant just what she said, both in law and in conscience. She meant that Jessie should have all the benefit of the relation of

parent and child. If individuals are ever to be taken at their word and held to it by the courts, surely they should be so taken under such circumstances as are here presented. How can the court say that Mrs. Stryker did not mean just what she said? And how can it say that she did not, by what she said, most fully and distinctly bind herself to perform all the obligations of a parent toward a child toward Jessie? And were not those obligations so made, of the same force as she would have been under to a child of her own loins? I cannot see how obligations, so voluntarily ³⁴⁷ assumed by a citizen, so affecting the highest welfare of an infant of the tenderest years, can be regarded as otherwise than the most sacred and binding. There was part performance of the obligation": See, also, *Johnson v. Hubbell*, 10 N. J. Eq. 332; 66 Am. Dec. 773, and authorities cited in note on page 784, under the head of "Agreements to make particular disposition of property by will. 1. Validity of such agreements; and 3. Mode of enforcement in equity." "It seems to be settled that the payment of the consideration will not in general be deemed such a part performance as to relieve a parol contract from the operation of the statute; but the reason for this, viz., that in such a case the repayment of the consideration will place the parties in the same situation in which they were before shows that the rule applies to a moneyed consideration. If the consideration for the contract be labor and services, those may sometimes be estimated and their value liquidated in money, so as measurably to make the promisee whole on the promisor's rescission of the contract; but in a case where the services rendered were of such a peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, . . . it is out of the power of any court, after the performance of the services, to restore the promisee to the situation in which he was before the contract was made, or to compensate him in damages. Such a case is clearly within the rule which governs courts of equity in carrying parol agreements into effect, where possession has been taken of landed property or moneys laid out in improvements upon land which the testator agreed to devise in consideration of care and maintenance during his life: *Rhodes v. Rhodes*, 3 Sand. Ch. 279."

In *Wright v. Wright*, 99 Mich. 170, the court held: "Defendant in his second year was indentured to deceased until

his majority. When he was eight deceased and his wife, being childless, adopted him under the law then in force, and his name was changed. ³⁴⁸ He gave them his entire services without pay till he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir; that her husband believed that this was effected by the adoption; that defendant thought he was their child till after her husband's death, and that they never talked about paying him for his services. The adoption law was held unconstitutional. Held, that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract," and states in the opinion: "In *Shahan v. Swan*, 48 Ohio St. 517, 29 Am. St. Rep. 517, the supreme court of Ohio expressly recognize the doctrine of these cases. It there said: 'Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal service of the party seeking relief, does not ordinarily constitute such part performance as will take the case out of the operation of the statute, we do not wish to be understood to hold that cases may not arise where specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services not intended to be, and not susceptible of being, measured by a pecuniary standard.'"

Sutton v. Hayden, 62 Mo. 101, was a case in which one Mrs. Green made an agreement by which she took, in its infancy, the child of her brother, upon the understanding that at her death all the property owned by her should go to the child. The child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child. Say the court: "There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being the subject of explicit ³⁴⁹ contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific execution of the contract." See, also, *Sharkey v. McDermott*, 91

Mo. 655, 60 Am. Rep. 270, where it was held that an agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child is enforceable as to the property on their death.

In *Brinton v. Van Cott*, 8 Utah, 480, it was held as follows: "A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the lifetime of the woman; and after her death equity will specifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard. . . . A contract by which an old woman, in apparent good health and having the expectancy of many years of life, agrees to leave all her property, worth about five thousand dollars, to a sixteen year old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is not void for want of mutuality and fairness; and, after her death, the contract will be specifically enforced in favor of the girl, who performed her part of the agreement though the woman died within three or four months after the execution of the contract." Also, "In this territory the statute of frauds is in full force: 2 Comp. Laws, sec. 2831. It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists in work, labor, and services personally done and rendered ³⁵⁰ by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement; but if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages.' Under these circumstances the rendition of the services is a part perform-

ance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud upon the party performing for the other party to refuse to perform his part as agreed between them: Pomeroy's *Specific Performance of Contracts*, sec. 114." See, also, *Korminsky v. Korminsky*, 21 N. Y. Supp. 611; *Godine v. Kidd*, 64 Hun, 585; *Jaffee v. Jacobson*, 48 Fed. Rep. 21; 1 Co. Ct. App. 24; *McKinnon v. McKinnon*, 56 Fed. Rep. 409; 5 Co. Ct. App. 530; *Haines v. Haines*, 6 Md. 435.

We will not further quote or cite authorities. We are fully convinced that the weight of authority and reason preponderates in favor of the position that the contract in the case at bar was such a one as a part performance will relieve from the operation of the statute of frauds; that there was a full performance of the contract on the part of the plaintiff and such a part performance by the Spilineks as did so take it out of the operation of the statute. We are further satisfied that the child had a right to bring the action to enforce the contract made for it by the parents, and that the proof of the contract was sufficiently clear, definite, satisfactory, and unequivocal to call for its enforcement by a court of equity, in the exercise of its discretion. The judgment of the district court is reversed, so ³⁵¹ far as it affected the rights of the plaintiff herein, and a decree is ordered in this court in favor of appellant, that the title to the property described in the petition is in appellant, and that it be quieted in her, except as against the mortgage liens thereon prior to the death of the Spilineks.

Decree accordingly. —

SPECIFIC PERFORMANCE—CONTRACT TO MAKE PARTICULAR DISPOSITION OF PROPERTY BY WILL.—The specific performance of a contract in equity is a matter resting in the sound discretion of the court. He who asks it has not an absolute right to it: *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672, and note. Courts of equity have power to decree the specific performance of an oral contract to dispose of property by will; and the ground on which they compel a specific performance of a parol contract concerning lands is the prevention of fraud. Such contracts are within the statute of frauds, but part performance takes them out of the statute: See monographic note to *Johnson v. Hubbell*, 66 Am. Dec. 787, 788, discussing the mode of enforcing agreements to make a particular disposition of property by will: *Green v. Broyles*, 3 Humph. 167; 39 Am. Dec. 156; *Carmichael v. Carmichael*, 72 Mich. 76; 16 Am. St. Rep. 528, and note.

AGREEMENT TO MAKE CHILD AN HEIR, EFFECT OF—ADOPTION.—A husband and wife, without children of their own, having agreed to take a young child, provide for and bring her up as their own, and at their death to leave

her all their property, and the husband, with his wife's consent having afterward adopted the child, it was held in an action for specific performance: 1. That the husband was not precluded by the contract from the perfectly free and unrestrained enjoyment of his property, and that he could dispose of it as he pleased, at any time during his life, by gift or otherwise; 2. That a conveyance in good faith, during his lifetime, of all his property to his wife vested in her an absolute title free from any trust in favor of the child; 3. That the contract was void as to the wife, and incapable of subsequent ratification by her, because of her coverture at the time it was entered into; 4. That a new verbal contract, made by the wife after her husband's death, was within the statute of frauds, and that a part performance by the child did not take it out of the statute: *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456.

AN INFANT MAY SUE IN HIS OWN NAME on a contract made for his benefit between two other persons, whether oral or written, and though it is made without his knowledge, and without any consideration moving from him: See monographic note to *Linneman v. Moross*, 39 Am. St. Rep. 532, 533, treating of a promise for the benefit of a third person.

BURLINGTON VOLUNTARY RELIEF DEPARTMENT OF CHICAGO v. WHITE.

[41 NEBRASKA, 547.]

LIFE BENEFIT ASSOCIATION—ACQUIRING RIGHT OF MEMBERSHIP WITHOUT FORMAL APPLICATION—ESTOPPEL.—The relief department of a railroad company, in the nature of a mutual insurance association, organized for the benefit and protection of railroad employees, in case of sickness or death, and which places an employee's name upon the roll of its members at his solicitation, and deducts from his wages his assessment for benefits, on the basis of membership, with knowledge of the fact that no formal application had been made, and no physical examination had, as required by the by-laws, is estopped from disputing such employee's membership, upon the suit of the widow to recover a death benefit, notwithstanding a rule of the department, defining and limiting its liability in cases of regular and formal applications.

LIFE BENEFIT ASSOCIATION—MUTUAL INSURANCE COMPANY—EQUITABLE ESTOPPEL.—The fact that the relief department of a railroad corporation, organized for the benefit and protection of railroad employees, is a mutual insurance company, does not relieve it from the operation of the rules of equitable estoppel.

LIFE BENEFIT ASSOCIATION—AUTHORITY OF SUBORDINATE OFFICERS TO WAIVE REQUIREMENTS.—If a person desiring to become a member of the relief department of a railroad company, organized for the benefit and protection of railroad employees in case of sickness or death, and placed under the general management of a superintendent does become such member, by the acts of the department, and in a manner different from that prescribed by its by-laws, and where all the steps taken toward that end are made with the knowledge of the superintendent, there is no question of the authority of subordinate employees to

waive requirements, as their acts in such a case are the acts of the department.

LIFE BENEFIT ASSOCIATION—NO DISCHARGE OF ACCRUED LIABILITY BY REFUNDING ASSESSMENT.—If a person is enrolled and becomes a member of a mutual railroad insurance association without the formal application or physical examination required by the by-laws the association, immediately after being notified of such person's disability, in case of subsequent sickness, cannot absolve itself from liability, and cancel the membership by refunding the member's contribution by "time check," which offer is made and refused just before the member's death, because the tender is not a legal one, and because liabilities have already accrued against the association from which it cannot discharge itself by refunding the assessment.

LIFE BENEFIT ASSOCIATION—BY-LAWS CANNOT PREVENT ACTION TO ENFORCE DEATH BENEFIT.—The rule of a relief department of a railroad company, having the nature of a mutual insurance association, restricting themselves to remedies before tribunals created by the association, does not deprive a beneficiary of the right to maintain an action against the department to enforce the payment of a death benefit.

LIFE BENEFIT ASSOCIATION—WIDOW AS BENEFICIARY.—The contract of a mutual railroad insurance association is ordinarily to pay the death benefit, where no beneficiary is named, to the wife of a member, if he has one. Hence, if one has become a member of such association without any written formal application, a court will hold the widow to be the beneficiary the same as it would if an application had been filed without designating any beneficiary.

Marquett & Dewees, John H. Ames, and Byron Clark, for the appellant.

Matthew Gering, for the appellee.

551 IRVINE, C. There is maintained in connection with the Chicago, Burlington & Quincy Railroad and certain allied companies what is called "The Burlington Voluntary Relief Department," which is the plaintiff in error. This voluntary association is somewhat in the nature of a mutual benefit society, paying to its members stipulated sums during disability caused by sickness or accident, and paying to designated beneficiaries certain sums upon the death of members. The members are employees of the railroad companies operating the department. The employing railroad company contracts to make up deficiencies in the relief fund for the payment of losses accruing to those employees. It also furnishes clerks and other employees to conduct the affairs of the department. The department has a superintendent charged with the general conduct of its business, but subject to the supervisory control of an advisory committee, consisting of the general manager of the Chicago, Burlington &

Quincy Railroad, certain members chosen by the directors ⁵⁵² of that road, and other members chosen by employees of different divisions of the road who are members of the department. The method prescribed for obtaining membership is for the employee to make an application upon a form prescribed by the by-laws, and submit himself to a physical examination by an examiner appointed by the department. His application is then passed upon by the superintendent, and, if approved, a certificate of membership is issued. The principal source of income is by deducting specified amounts monthly from the wages of the members. The railroad company makes this deduction and retains the fund, paying interest to the department upon monthly balances in its hands. These are the general features, to some of which it will be necessary hereafter to refer more specifically.

Landon T. White was in 1890 employed as an engineer by the Chicago, Burlington & Quincy company. On July 21st of that year he met a soliciting agent of the department, also an employee of the company, and suggested to him his desire to become a member of the department. The agent then filled out, in triplicate, a printed form used for the purpose, headed "Notice of Application for Membership," stating the applicant's name, date at which application was to take effect, applicant's occupation, age, wages, and the class of membership to which he desired to be admitted. On this form the date at which the application was to take effect was stated as July 21, 1890, the day the form was filled and dated. One of these forms was sent to the superintendent at Chicago, one to the paymaster, and one to the superintendent of motive power. The following day White was taken sick. Upon a subsequent day the medical examiner called at his house, but testified, that, finding White not in a physical condition to make the examination, none took place. According to Mrs. White some kind of an examination was made, but its nature does not appear. On August 7th the employee of the company charged with that duty filled out another form in triplicate, entitled ⁵⁵³ "Notice of Disability," the contents being indicated by the title, sent one form to the department physician, one to the superintendent of motive power, and one to the superintendent of the relief department. In the mean time White's name had been placed on a roll of members of the relief department, and from the payroll for July there had been deducted from the wages of

White, by the officer charged with that duty, four dollars and ten cents, being an assessment upon White for all of August, and for that portion of July following the 21st. On September 19th the superintendent of the department wrote to the superintendent of motive power as follows:

“CHICAGO, ILL., September 19, 1890.

“*Mr. D. Hawksworth, Supt. Motive Power, Plattsmouth, Neb.,*

“DEAR SIR: L. T. White, engineman, Plattsmouth, made preliminary application on form 3 July 21 for membership in the fourth class, to take effect July 21, and was taken sick on July 22, as per form 8, No. 15,753, issued by J. E. Barwick, before medical examination could be made. Mr. White is not a member of the fund, and the contribution of four dollars and ten cents deducted on the July roll should be refunded him at once by time check. Will you please see that this is done, also that the form 8 is canceled.

“Yours truly,

“J. C. BARTLETT, Supt.”

On the 20th an employee was sent to White's house, where he made a tender of what is designated a “time check.” This was on a printed blank, in form a certificate signed by the master mechanic of an amount due for labor for a specified time; but taking this document as it was written it reads as follows:

“BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN
NEBRASKA.

“(C., B. & Q. R. R. Co., OWNER.)

“PLATTSMOUTH, NEB., Sept. 20, 1890.

“L. T. White has worked for this Company Relief Dept. C. R. in month of September.

554 “Amount due, four dollars & $\frac{10}{100}$ (\$4.10).

“D. HAWKSWORTH, Master Mechanic.

“S. W. Dutton.”

This was refused by White and his wife. A few hours afterward White died. No application according to the form prescribed had ever been made by White, and it may be assumed that there had been no physical examination. The defendant in error is White's widow, and she brought this action to recover the amount of the death benefit.

A portion of the argument is addressed to the rulings of the court on the admission of evidence. It has been so frequently decided that such rulings will not be reviewed in the

absence of specific assignments in the petition in error calling attention to the particular rulings complained of, that it is unnecessary to cite those decisions. There is no assignment in the petition in error herein of the character required to present any of these questions for review. This leaves the case to be determined practically upon a consideration of the instructions given and refused. The court charged the jury quite at length, and refused nine of the instructions asked by the defendant below. One so requested was given with modification, but the transcript is in such shape that it is impossible to determine in what the modification consisted, and it is only by the exceptions noted on the margin that we ascertain that there was any modification. Fortunately for the ends of conciseness the case is presented in such a manner that it becomes unnecessary to review the instructions in detail. The burden of the instructions excepted to was to the effect that if the jury should find that a verbal application for insurance was made, that the deceased was not called upon to make a written application; that he was not called upon to submit to a physical examination; that he had not agreed as a condition to his insurance to submit to such examination; that the relief department had taken from his pay the assessments due from a member, and had retained the same, ⁵⁵⁵ then that these facts would estop the department from denying his membership, and would constitute a waiver of the written application and physical examination. The jury was furthermore instructed that the tender of the time check was not a sufficient tender of a return of the assessment withheld. The effect of the instructions requested and refused was that by the by-laws of the department the assessments were to be made in advance; that the application for membership must be made according to the form prescribed; that a physical examination must take place and thereafter the application must be approved by the department before the applicant should become a member; that the applicant was bound by all the conditions of the constitution and by-laws. Under the evidence in the case the instructions asked by the defendant amounted practically to an instruction to find for the defendant, and the instructions given practically amounted to an instruction to find for the plaintiff. We may, therefore, consider the questions presented generally, without reference to the specific instructions.

We think that upon every principle of equity the court took the correct view of the law. The notice of application was transmitted by the soliciting agent to the superintendent of the relief department, notifying that officer of White's desire to become a member. It was also sent to White's immediate superior as an employee of the railroad company, for what purpose is not so clear, but from the testimony evidently, in part at least, for the purpose of enabling clerks in that department to keep their records upon the basis of White's membership in the department. A third copy was sent to the paymaster, evidently for use in connection with the collection or rather withholding of assessments. The department certainly had notice of his application. His name was entered upon a membership roll of the department, with a statement that his application took effect July 21, 1890. Upon the subject of assessments ⁵⁵⁶ the rules are as follows: "Contributions will be due on the first day of the month, and will, ordinarily, be deducted from the members' wages from the payroll of the preceding month." "The contribution for a month, or any unexpired part of a month, in which an application takes effect shall be made on the payroll for that month, together with the contribution for the following month." "A member shall not make contribution for any time during which he is entitled to benefits, except for the month in which the disability begins." The deduction was made in accordance with these rules from White's pay, contribution for the fraction of July and the whole of August being taken from the July payroll. The only right which the company could claim for withholding these assessments from the members' pay, and the only right which the department could claim for receiving them, is derived from a clause of the application, which is a part of the by-laws, whereby the company is authorized to withhold such moneys. The application also is required to specify the date when it is to take effect. Another provision of the by-laws is that if the application is approved it shall take effect on the date specified therein. We have here, then, this association, acting through the same officers as the railroad company, or, in other words, the railroad employees acting under authority of the association, receiving notice of White's application for membership, and that it was to take effect on July 21st. We have them deducting from his pay assessments from July 21st, their sole right to do so being by

virtue of White's being a member of the department. We have them holding this money until the day before his death, when an effort is made to disclaim his membership and refund his contribution by the tender of a paper which was neither money nor a promise to pay money. In a case unencumbered by the technicalities of the law of insurance there could be little doubt that a party so conducting itself would be estopped from denying liability. ⁵⁵⁷ While the authorities are very numerous in regard to contracts of mutual insurance and in regard to benefit associations, but little light is derived from them in the solution of the questions here presented. The cases are nearly all inapplicable, because of the peculiar constitution of this association. Most of the mutual benefit associations perform social functions or are such organizations that the insurance is only an incident of the membership. There, the question as to whether one is or is not a member must be solved with a view to other objects of the association. In the case of mutual insurance companies every payment is voluntarily made by the member and may be with the express or implied understanding that its payment is merely conditional. Here, while the assessments are termed voluntary contributions, they are only voluntary in the sense that an employee of the railroad may enter the association or not as he sees fit. If he elect to enter, he must in so doing give to his employer and the association the power to seize the assessments without any further exercise of his own volition. White did not voluntarily make a payment in connection with his application, knowing that the money might be held for some time and then his application refused; but the department seized his money, and its act in doing so was wrongful, unless by becoming a member he had given the department the right to take it. By its own acts it subjected him to the obligations of membership, and it cannot deny him its privileges.

It is urged in argument that White's application had simply been delayed by reason of his sickness, and inaction for that reason would not estop the department. If there had been merely inaction the case would not be difficult, but there was very decided action on the part of the department. It seized White's money, which it had no right to do unless he was a member, and retained it until a loss occurred and for some six weeks after notice of his sickness. If I give to another authority to take my property ⁵⁵⁸ in con-

sideration of certain agreements by him to be performed, and he goes and seizes my property and retains it, it is not difficult to determine that he should not be permitted to disclaim liability upon his agreement. He cannot receive the fruits of his contract and reject its burdens. We know of no principle of law exempting a mutual insurance company from the operations of such an estoppel. If there were authority to that effect we would not recognize it. The doctrine of estoppel is based upon the requirements of morals and conscience, obligations which even mutual insurance companies should recognize. But it is said that White did not alter his condition in reliance upon the acts of the department, and that therefore the principle of equitable estoppel does not apply. We presume that counsel do not think that his parting with a portion of his pay was an alteration of his position. Generally, the payment of money is sufficient as an act of reliance to render an estoppel operative, and we do not think that the amount of money paid affects the case. Next it is said that neither the soliciting agent nor different clerks who took part in the transactions had authority to waive compliance with the by-laws of the association. We need not inquire into the special authority of subordinate employees. The evidence shows that every material fact was speedily communicated to the superintendent who was charged with the general management of the business, and had authority to approve or reject applications. This is true except as to the entry of White's name upon the roll of members; but this we consider, in the light of the evidence, an immaterial fact, except as such entry may have led to the withholding of White's pay. The superintendent's power was general; his knowledge was that of the department; his acts were those of the department. We think, so far, there was a complete case of estoppel made out, and the court's instructions were fully warranted.

Much stress is placed upon rule 49 of the department, ⁵⁵⁹ whereby it is provided that an employee who has passed a satisfactory medical examination and has made a proper application for membership shall, notwithstanding the delay in examining his application, be entitled to the benefits and subject to the obligation of membership; but shall in the mean time be entitled only to benefits on account of injury or death caused by accident. The objection to applying this rule is that White was not within its provisions. This was

not the case of a delay after a proper application and medical examination where the application would bind him by all its terms, but the case of the department treating White as a member, seizing a portion of his pay in a way only authorized under such circumstances, and thereby estopping itself from setting up that there had not been an application and examination and approval on the 21st of July. The department cannot invoke this rule without admitting that there had been both an application and an examination. The facts, indeed, require it to admit this much, but require it to admit more; that is, that the application had been accepted. But little is required to be said as to the effect of the department's attempt to refund the so-called contribution to the defendant before White's death. Perhaps the company recognized such a document as we have above set forth as an instrument for the payment of money. Certainly no one else would so recognize it, and even if money had been tendered it would be extremely doubtful whether a tender made to a man upon his death-bed, within a few hours of final dissolution, would amount to a valid tender in any case. Certainly in this case, White's money having long before been taken and the disability having already accrued by which he became entitled to compensation by the department, he was not then required to accept a return of his money in lieu of a discharge of the obligations already incurred by the department.

A section of the rules of the department provides that all questions or controversies of whatsoever character arising ^{see} in any manner or between any parties or persons in connection with the relief department or operation thereof, whether as to the construction of language or the meaning of the regulations of the relief department, or as to any right, decision, instruction, or acts in connection therewith, shall be submitted to the determination of the superintendent of the department, whose decision shall be final and conclusive, subject to the right of appeal to the advisory committee. Based upon this rule the defendant requested an instruction that if the jury believed that the superintendent had passed upon this claim and rejected the same, such decision was conclusive, unless an appeal had been taken to the advisory committee. This instruction was properly refused. We have no doubt of the power of members of voluntary associations to restrict themselves, at least as to matters incidental

to the operation of the association, to remedies before tribunals created by the association. It is only to this extent that the rule seems to apply. It certainly does not apply to this case. In the first place, while the superintendent, immediately after notification of White's death, did write a letter denying White's membership, there was no hearing before him. In so doing he was acting as the executive officer of the association in disclaiming liability, and was not judicially examining and determining a controversy between the association and one of its members. In the next place, we fail to see how the association, while denying White's membership, can invoke the protection of a rule necessarily affecting members alone. Finally, this was not a controversy arising during White's membership. His membership terminated with his death. Mrs. White's rights were then complete. She had no voice in the management of the association, and her interests were adverse thereto. She was not, and could not be, bound by the decision of the officers of the association. This was the view taken in the opinion of Judge Gary in *Railway Passenger etc. Assn. v. Loomis*, 43 Ill. App. 599. The supreme court of Illinois reversed Judge Gary's judgment, but upon an entirely different point: *Railway Passenger etc. Assn. v. Loomis*, 142 Ill. 560.

Finally, it is contended that the widow was not the beneficiary, and cannot maintain the action. The application in the by-laws contains the following: "Death benefits shall be payable to —— (here designate the beneficiary or beneficiaries), or to such other person or persons as I shall subsequently designate in writing in substitution thereof, . . . otherwise to my wife." To this form there is a footnote as follows: "If no beneficiary is designated a line will be drawn through the blank space, and through the following words beginning 'or such other person or persons' and ending and including the words 'otherwise to.'" White not having designated a beneficiary, his application, if one had been filed, would read under this by-law "death benefits shall be payable to my wife." It is clear that the contract of the department is to pay the death benefit, where no beneficiary is named, to the wife of a member, if he have one, and Mrs. White was, therefore, the proper person to maintain the action.

Judgment affirmed.

MUTUAL BENEFIT ASSOCIATIONS—RULES GOVERNING, ESTOPPEL, AND BENEFICIARIES.—There is no distinction between mutual insurance companies and mutual benefit societies, except where a statute has created a difference: *Block v. Valley Mutual Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 166. Mutual benefit societies are subject to the rules of law governing life insurance companies, except so far as those rules are modified by the organization, objects, and policy of such societies: See note to *Union Mutual Assn. v. Montgomery*, 14 Am. St. Rep. 526. It is competent for a mutual benefit society to provide for the presentation of claims to officers designated in its by-laws, and to prescribe a mode of procedure, provided it does not deprive parties of property rights. But it is not competent for parties to a contract, in advance of any dispute, to oust the jurisdiction of the courts by providing that the decision of persons named in the contract shall be final and conclusive. Therefore, a provision in the by-laws of a mutual benefit insurance society that the decision of its officers on a member's claim for benefits shall be final and conclusive is ineffective, and cannot bar an action to recover such benefits: *Supreme Council v. Forsinger*, 125 Ind. 52; 21 Am. St. Rep. 196. A beneficial association receiving and retaining money offered in payment of an assessment thereby waives any objection growing out of delay in such payment. It cannot retain the money on some condition created by its officers or agents, and not communicated to the payor, and then upon his subsequent death escape liability because of such condition and the noncompliance therewith: *Shea v. Massachusetts Benefit Assn.*, 160 Mass. 289; 39 Am. St. Rep. 475. Either the statutes of the state or the charter or by-laws of mutual benefit societies usually provide that the fund is established for the benefit of the widows, children, orphans, relatives, or dependents of deceased members. If such provision is made, the beneficiary designated must be one of the class mentioned, and not a creditor or other person not related to the deceased member. On the failure of a member to designate a valid beneficiary, his benefit will go to the parties named in the charter and by-laws of the association as beneficiaries, in the order therein named: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 786, 789, discussing the law of mutual benefit associations.

BEATRICE GAS COMPANY v. THOMAS.

[41 NEBRASKA, 602.]

ONE MUST SO USE HIS PROPERTY as not to injure his neighbor.

NUISANCE—UNDERGROUND WATERS—POLLUTION OF.—While the owner may have the right to appropriate underground water on his premises, and thus prevent its use by another, he has no right to pollute, contaminate, or poison it, however innocently, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast.

NUISANCE—POLLUTION OF WELL—DAMAGES.—One who collects injurious or offensive matter upon his premises, which, by percolation, transmission through subterranean streams, or otherwise, pollutes his neighbor's well, is liable for the damages sustained.

NUISANCE—POLLUTION OF WELL—SCIENTER.—To recover damages for the pollution of a well it is enough that it was the natural and probable consequence of the defendant's acts. It is not necessary that the fact of contamination was known to the defendant.

CONTINUING NUISANCE—POLLUTION OF WELL—MEASURE OF DAMAGES.—If the pollution of a well causes permanent and irremediable damage to plaintiff's land he is entitled in one action to all damages, present or prospective; but if temporary in character, and capable of being avoided in the future, he can recover damages only up to the commencement of the action, as the contamination is then in the nature of a continuing nuisance.

NUISANCE—POLLUTION OF WELL—EVIDENCE.—In an action to recover damages for the pollution of a well, evidence that the injury can be avoided by the digging of a new well is admissible in mitigation of damages, but is no defense to the action.

NUISANCE—POLLUTION OF WELL—EVIDENCE.—After the plaintiff, in an action to recover damages for the pollution of his well, has introduced evidence that other wells in the neighborhood were likewise affected, defendant should be allowed to show that other wells a great distance away were similarly polluted, as this would tend to show that the cause in both cases was a general one, affecting the whole region, and not the act of defendant. Such evidence, however, should be confined within reasonable limits to avoid the danger of introducing collateral issues into the trial.

W. S. Summers, for the appellant.

R. W. Sabin and J. B. Betts, for the appellee.

664 IRVINE, C. Thomas brought this action against the gas company, alleging that the plaintiff was the owner of a certain lot in South Beatrice, and had been such owner for five years, occupying the premises as a homestead; that he dug a well thereon suitable for use; that the gas company operated 665 and maintained its manufactory one block from the property of the plaintiff; that contiguous to this factory the gas company made a large excavation in the ground reaching into the sand, into which it emptied all the filth and waste coming from its factory, consisting of a deadly and poisonous liquid which was absorbed into the sand, and by said sand carried and percolated itself from the cesspool through the ground to the plaintiff's well, rendering the water therein unfit for use, dangerous, and unwholesome; that by reason of the premises the plaintiff had lost his well, his land had been rendered unfit to make another well, he had been compelled to carry water necessary for household use and for stock for a long distance; that he had expended large sums of money in efforts to remedy the evil; that the value of his property had been destroyed, all to his damage in the sum of

nine hundred dollars. The answer amounted to a general denial. There was a trial to a jury, and a verdict and judgment for the plaintiff for four hundred and fifty-three dollars and seventy-eight cents, from which the gas company prosecutes error.

The evidence on the trial tended to show that the gas company sank what it calls a "condense well" on its own property at a distance of four hundred and ninety-two feet from plaintiff's well; that into this condense well the company permitted to flow certain waste products; that some months after this condense well went into use it was discovered that plaintiff's well was contaminated. Some time afterward the water became wholly unfit for use. There seems here to be a stratum of sand between beds of rock and clay. The condense well reached the sand. Plaintiff's well passed through the sand and into the rock. The odor of the water in plaintiff's well after its contamination was similar to the odor in the neighborhood of the condense well. The odor resembled that of naphtha, and there was evidence tending to show that the gas company used naphtha in its process. During the trial evidence was introduced tending to show that other wells in the neighborhood of plaintiff had been ~~was~~ contaminated in like manner. The admissibility of this evidence under ordinary circumstances would be at least doubtful, but under the circumstances of this case we think the action of the trial judge was correct. The evidence first came in in connection with proof that the plaintiff was compelled to carry all the water for his household use from a great distance, and he accounted for this fact by proving that a nearer well was polluted in the same manner as his own. Moreover, there were suggestions in the course of the examination of witnesses that plaintiff's well had been polluted by the voluntary act of himself or some other person. After this evidence was in, and near the close of the defendant's case, an effort was made by the gas company to show that a well had been sunk on the opposite side of the river and that the water obtained in that well was contaminated in the same manner. This evidence was excluded. The record does not show how far this well was from the gas-works, but it does appear it was in another portion of the city. We think the court should have admitted this evidence. The fact that other wells at a considerable distance were likewise polluted would not conclusively show

that the pollution of plaintiff's well was not due to the gas company, but it would tend in that direction, and the greater the distance the stronger the inference would be that the cause in both cases was a general cause affecting the whole region, and not the act of the gas company complained of. We are aware that the introduction of such testimony leads to the danger of introducing collateral issues into the trial. At the same time we think that such evidence was material, and, within reasonable limits, should have been admitted, especially as the plaintiff had introduced proof of the contamination of neighboring wells. For this error the judgment must be reversed, but as a new trial must be had it is proper that we should consider the fundamental questions raised by the record.

The gas company contends that there could be no liability ⁶⁶⁷ for an injury of the character complained of. This question is raised by the assignment that the petition does not state a cause of action, and by exceptions to the instructions, which were to the effect that, if matter in the condense well percolated through the ground into plaintiff's well, polluting the water, then the condense well was a nuisance, for the maintenance of which the plaintiff was entitled to damages. The law on the subject, as stated in the adjudicated cases, is not in a condition very satisfying to the reason. The cases are so numerous that a complete review would be unprofitable and almost impossible. We shall select certain cases which are probably those most frequently cited and those which have served as landmarks for the discussion.

In a number of cases, of which *Acton v. Blundell*, 12 Mees. & W. 824, is representative, it has been held that the law in relation to surface watercourses is not applicable to subterranean streams, and that a proprietor has no cause of action because of the fact that another, by sinking a well, or by the proper opening of a mine, taps a subterranean watercourse and deprives such proprietor of the water supply for his own well. This doctrine is put chiefly upon the ground that the existence, course, and extent of a subterranean watercourse must be largely unknown; a reason not altogether satisfactory. In such cases the maxim is applied that the proprietor of land owns from the center of the earth to the heavens. The applicability of this maxim is doubtful, for the reason that it would seem to apply as well to a stream on the surface as to a subterranean stream. Still we think the doc-

trine must be accepted because of its firm establishment, and upon the principle that each proprietor is entitled to the use of such streams while on his premises, although the effect of that use may be to diminish his neighbor's use thereof. Together with these cases came a series represented by *Womersley v. Church*, 17 L. T., N. S., 190, wherein ⁶⁶⁸ it was held that a man has no right to place offensive matter upon his land where percolation through the soil takes place, contaminating his neighbor's well, and that for such acts an action may be maintained. In *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56, this doctrine was followed where a vault had been constructed from which percolation took place through the soil to the injury of another's well and cellar. Following these cases came a series best represented by *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49, and *Ballard v. Tomlinson*, 26 L. R. Ch. Div. 194, wherein it was attempted to reconcile the two classes of cases we have referred to, by drawing a distinction between a percolation through the soil and a contamination produced by means of a subterranean watercourse, it being said that if a man had no right of action because his supply of water was cut off by tapping the subterranean stream he could have no right of action because it was polluted through such subterranean stream. This was, we think, a *non sequitur*. While a man may use water from a stream to the diminution of his neighbor's supply, it does not follow that he may pollute the water and pass it on to him in its polluted state. So, in the case of subterranean streams, I have, as much as my neighbor, the right to tap them and use them while they are on my premises, and he cannot complain of that use; but it does not follow that I may contaminate them on my premises and permit the pollution to pass upon my neighbor's. The fallacy referred to drove the courts to the distinction pointed out. The effect of such distinction would give the plaintiff here a right of action, provided he could prove that the offensive matter percolated through the soil to his well without the aid of a subterranean watercourse, but would deprive him of his action in case such watercourse was a conductor of the offensive matter. It is rather strange that so absurd a distinction should have obtained such strong support in the authorities. It has even received the approval of Judge Cooley in *Upjohn v. Richland Township*, 46 Mich. 542, 41 Am. Rep. 178, but that case is not authority in support of

the doctrine, for the reason that Judge Cooley's remarks in that case are clearly *obiter*, and the case was decided upon other grounds. The fallacy of these cases has recently been recognized by the courts, and the more recent decisions tend strongly to overthrow this doctrine, which seemed in danger of becoming fixed in our law by repeated decisions.

Collins v. Chartiers Valley Gas Co., 139 Pa. St. 111, was a case where the gas company, in digging a well for natural gas, tapped a fresh-water watercourse, and also a salt-water stream. By negligence in its manner of drilling its well the salt water was commingled with the fresh water, injuring a spring of plaintiff. It was held that the defendant was liable because of this unnecessary injury of plaintiff's property.

In *Pensacola Gas Co. v. Pebley*, 25 Fla. 381, *Ballard v. Tomlinson*, 26 L. R. Ch. Div. 194, was distinguished upon the theory that in the latter case the pollution had been caused by the plaintiff himself in pumping his own well so as to draw water from the other. In drawing this distinction the court went, perhaps, too far to sustain the English case; but we think the conclusion reached was in accordance with sound principle, to wit, that it was the duty of the gas company to confine the refuse from its works so that it could not enter upon and injure its neighbors, and if it failed to do so it was at its peril.

The most satisfactory exposition of the subject which has come to our notice is found in the case of *Kinnaird v. Standard Oil Co.*, 89 Ky. 468, 25 Am. St. Rep. 545, where, after a review of some of the cases already referred to, the court says: "It seems to us, after a careful review of the authorities referred to by counsel for the corporation, all of which are entitled to great weight, that there is a manifest distinction between the right of the owner of land to use the underground water upon it that originates from percolation, or ⁶⁷⁰ is found in hidden veins, and the right to contaminate it so as to injure or destroy the water when passing to the adjoining land of his neighbor. It is a familiar doctrine that one must so use his property as not to injure his neighbor; and, because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or

beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both, and, while he can thus appropriate it, he has no right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beasts on his farm. As soon as the water leaves the land of the one who claims the right to use it, and runs on the land of another, the latter has the same right to appropriate it, and, if property, it then becomes as much the property of the last as the first proprietor. The owner of land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it; and still it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor to the injury of the health of himself or family; if not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor's, producing the same results, and still escape liability for the damages sustained; and whether the water escapes the one way or the other is immaterial."

Our conclusion is, therefore, that the distinction made in the earlier cases is not well founded, and that one who collects injurious or offensive matters upon his premises, which, by percolation, transmission through subterranean streams, ⁶⁷¹ or otherwise, pollutes his neighbor's well, is liable for the damages sustained.

The defendant contends that no action will lie for any damages sustained prior at least to the time when defendant had notice of the injury. We can see no force in this contention. It is true that some of the cases base the right to recover upon defendant's knowledge that he was committing the injury. But the injury was as great before as after notice. An action in tort is not a proceeding to punish a defendant for a willful act, but to compensate the plaintiff for the invasion of his rights. It was not necessary, in order to constitute the pollution of the well a tort, that it should be done willfully. The most that can be said is that the defendant would not be liable for damages unless the injury was one which was the natural and probable consequence of his acts. While the defendant may not have

known, and probably did not know, that its condense well would pollute the plaintiff's well, it was bound to know that the natural and probable consequence of collecting waste matter in its condense well would be the injury of some wells which might be connected with the condense well by the stratum of sand referred to.

Complaint is also made of the court's instruction in regard to the measure of damages, for the reason that it allowed the jury to take into consideration all damages sustained to the time of trial. It was held in *Omaha etc. R. R. Co. v. Standen*, 22 Neb. 343, that a bridge negligently constructed so as to make an unlawful obstruction to the Platte river, injuring land above the bridge, was a continuing nuisance, for which damages could only be recovered to the time that action was brought. We presume this was upon the theory that there was no permanent injury to the land, and that the damages only existed while the bridge was maintained in the manner complained of. The general policy of the law is to avoid multiplicity of actions, and, if practicable, without injustice, to afford compensation ⁶⁷² in one action for all injuries. We think the rule is stated correctly in Wood on Nuisances, section 869, as follows: "Where the damages are of a permanent character, and go to the entire value of the estate affected by the nuisance, a recovery may be had of the entire damages in one action. Thus, in an action for overflowing the plaintiff's land by a milldam, the land being submerged thereby to such an extent and for such a period as to make it useless to the plaintiff for any purpose, the jury were instructed to find a verdict for the plaintiff for the full value of the land. So, too, when a railroad company by permanent erections imposed a continuous burden upon the plaintiff's estate, which deprived the plaintiff of any beneficial use of the portion of the estate so used by it, it was held that the whole damage might be recovered at once; but where the extent of a wrong may be apportioned from time to time, and does not go to the entire destruction of the estate, or its beneficial use, separate actions not only may, but must, be brought to recover the damages sustained." There was in the case under consideration evidence that the value of plaintiff's property had been diminished by the contamination of the well. The inquiry, we think, should have been as to whether or not the defendant's acts had caused a permanent and irremediable injury to plaintiff's property.

If so, the plaintiff was entitled to compensation in this action for all such injury, present or prospective. If, on the other hand, the injury was temporary in its character and capable of being avoided in the future without permanent injury to plaintiff's freehold, the case was one of a continuing nuisance, and damages should have been restricted to the commencement of the action.

There is some discussion in the briefs of the law of avoidable consequences as applied to the case. The court properly refused to instruct the jury that there could be no recovery because plaintiff had not endeavored to procure ⁶⁷² a good well upon his premises. His failure to do so would not be a defense to the action, but would go in mitigation of damages, provided the jury should find that by making another well the injury could be avoided, and it is for the same reason that the plaintiff would be entitled to recover any reasonable expenses he might have incurred in an effort to purify the old well or obtain a new one.

For the errors referred to the judgment must be reversed and the cause remanded.

EVERY ONE MUST SO USE HIS OWN PROPERTY as not to hurt another: *Fish v. Dodge*, 4 Denio, 311; 47 Am. Dec. 254. No man can so use his property as to create a nuisance, or have property which is a nuisance where it is situated: *State v. Yopp*, 97 N. C. 477; 2 Am. St. Rep. 305.

NUISANCE — SUBTERRANEAN OR PERCOLATING WATERS — POLLUTION THEREOF — SCIENTER — DAMAGES. — Percolating water belongs to the realty in which it is found: See monographic note to *Wheatley v. Baugh*, 64 Am. Dec. 727, treating of subterranean or percolating waters. But the owner of the soil has no rights in subsurface waters not running in well-defined channels, as against their neighbors, who may withdraw them by wells or other excavations: See note to *Kingsbury v. Flowers*, 39 Am. Rep. 17. Unless the injury is caused by malice it is *damnum absque injuria*: *Williams v. Ladew*, 161 Pa. St. 283; 41 Am. St. Rep. 891; note to *Swett v. Cutts*, 9 Am. Rep. 284. The owner may cut drains or mine or quarry, though in so doing he interferes with the flowage of water in hidden, unknown, underground channels: See note to *People's Gas Co. v. Tyner*, 31 Am. St. Rep. 438. He is liable, however, for polluting or fouling waters which percolate and pass from his land to premises adjoining: See note to *Wheatley v. Baugh*, 64 Am. Dec. 729. Hence, if the owner of land or his tenant erects a warehouse, and places and keeps coal oil therein, which, leaking from the casks, saturates the ground, and pollutes a subterranean stream from which a spring on the land of an adjacent proprietor is fed, the latter may maintain an action for damages thus suffered by him, though the owner did not know of the injury which the percolation of the oil was doing to the spring: *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; 25 Am. St. Rep. 545 and note.

NUISANCE—RECOVERY OF DAMAGES FOR IN ONE ACTION.—If nuisances are of a permanent character a single recovery may be had for the whole damages, both present and prospective, resulting from the act: See note to *Hodge v. Shaw*, 39 Am. St. Rep. 295; *Joseph Schlitz Brewing Co. v. Compton*, 142 Ill. 511; 34 Am. St. Rep. 92, and note; but if not of a permanent character, damages can be recovered only for the injury sustained up to the time of the commencement of the action: *Denver City Irr. etc. Co. v. Middaugh*, 12 Col. 434; 13 Am. St. Rep. 234; note to *St. Louis etc. Ry. v. Biggs*, 20 Am. St. Rep. 177. This rule applies to an action for polluting a spring by suffering coal oil to percolate into an underground stream from which the spring is fed: *Kinnaird v. Standard Oil Co.*, 89 Ky. 468; 25 Am. St. Rep. 545.

GULICK v. WEBB.

[41 NEBRASKA, 706.]

QUESTIONS OF LAW NOT ARGUED IN THE SUPREME COURT ARE DEEMED TO BE WAIVED.

JUDICIAL SALES—VALIDITY OF AGREEMENT TO MAKE JOINT BID.—An agreement to make a joint bid at a judicial sale, although it may indirectly have the effect of keeping others from bidding, is not illegal unless it is intended to avoid competition. Hence, in the absence of any fraudulent or illegal intent or purpose, an agreement whereby one of several persons is authorized to bid for their common benefit on property about to be sold at sheriff's sale is not invalid.

JUDICIAL SALES—COMBINATION TO MAKE JOINT BID.—A combination between several persons holding liens against real property sold at sheriff's sale, no one of whom is able financially to bid individually at such sale, whereby one of such persons, by attorney, bids in the property for himself and the other lienholders, is not forbidden or contrary to law, and does not vitiate the sale.

JUDICIAL SALES—SALE TO COMBINED BIDDERS WILL BE UPHOLD, WHEN.—A judicial sale to an association of persons formed for an honest purpose and with an honest intent, not with a view of stifling competition as to bids, but to enable them to compete where, without combining, they could not do so, will be upheld and completed.

W. Henry Smith, for the appellants.

Stevens, Love & Cochran, for the appellee.

706 HARRISON, J. As the result of an action in the district court of Lancaster county to foreclose certain mechanics' and mortgage liens, the property proceeded against, to wit, lots Nos. 7 and 8, in block No. 315, of Jane Y. Irwine's addition to the city of Lincoln, otherwise known as subdivision 62 of S. W. Little's subdivision of the west half of the southwest quarter of section 24, in township 10 north, range 6 east of the sixth parallel meridian, in the city of Lincoln, Ne-

braska, was sold by the sheriff of said county under and by virtue of an order of sale issued in accordance with the terms of a decree rendered in the suit. The sale was made on the sixteenth day of February, 1892, to William H. Tyler, for the sum of thirteen thousand dollars, which was more than two-thirds of the appraised value. To the confirmation of the sale objections were filed by George E. Bigelow, as follows:

"Comes now the defendant George E. Bigelow, and shows and represents to the court that he is the owner of ⁷⁰⁰ the equity of redemption in and to the property described in plaintiff's petition in the above-entitled cause, and in the several answers and cross-petitions of the defendants therein, and objects and protests against the confirmation of the sale heretofore made by the sheriff of the said premises described in said petition, for the following reasons, to wit:

"1. That said premises were not appraised in accordance to the laws of the state of Nebraska; that they were not appraised at their real value in money, but were appraised at a sum far below and vastly less than their real value in money.

"2. That there was a confederation and combination on the part of the judgment lienholders in this cause to bid said property in at a certain sum far less than its value and far less than two-thirds of its real value in money, and that by said combination and confederation, so formed and entered into by the said judgment lienholders, purchasers were prevented from bidding at said sale, and said property was prevented from selling for a sum equal to what it would have brought had such confederation and combination not been formed; that said confederation and combination so formed prevented competition in bidding at the sale of said property, and prevented purchasers from bidding thereon, and was in fraud of the rights of the owner of the equity of redemption of said premises; and if said sale is confirmed and allowed to stand, it will work great and permanent loss and injury to this defendant.

"This defendant therefore moves the court that said sale be not confirmed, but that the same be set aside and held of no force or effect."

Subsequently additional objections were filed by D. T. Coffman and George E. Bigelow, as follows:

"And now, February 23, 1892, come the above-named

parties and by leave, etc., file the following objections and protests against the confirmation of the sheriff's sale, etc:

710 "1. The property was not properly appraised, as appears by appraisement filed.

"2. No proper return of sale was made by the sheriff, as required by law, prior to the first order of confirmation.

"3. No proper notice was posted in the sheriff's office, as is the custom of law prior to sale.

"4. The property was not properly described in the newspaper publication, as per affidavits of D. T. Coffman and George E. Bigelow, filed herewith and made a part hereof, in that it was not sufficiently identified and located, nor was it sufficiently described by improvement, so as to distinguish or identify it or to attract bidders or to assure them that the improvements belonged to the property.

"5. An unlawful combination was entered into by several of the claimants and lien creditors to prevent competition at the bidding or crying of the sale, and that such combination was carried out and rival bidding was prevented, to the injury of the defendant and certain of the creditors.

"6. The property was sold at a grossly inadequate price, far below what it would have brought had not an unlawful combination been entered into to prevent bidding, and to cause it to be sold at a sacrifice and to the injury of the defendants Coffman and to the second mortgage creditor, George E. Bigelow.

"7. The description of the property in the published advertisement was inadequate, vague, and uncertain, and calculated to mislead purchasers.

"8. The liens in the district court, Lancaster county, Nebraska, against the property sold were not properly certified to the sheriff. Witness the certificate, made a part hereof, under date of February 15, 1892.

"9. The sale was contrary to law."

Upon a hearing in the district court the objections to confirmation were overruled and the sale confirmed, to which action of the court the parties objecting duly excepted and 711 have removed the case to this court for an examination and adjudication upon the question of the confirmation of the sale.

Counsel for appellants in his brief filed in this court argues but one of the grounds of objection to confirmation of the sale, and, conforming to a well-established rule that ques-

tions not argued here will be deemed to be waived, we conclude that he rests the case upon the one ground alone and has abandoned all others. The objection, then, upon which the appellants rely is as follows: "An unlawful combination was entered into by certain of the claimants and lienholders to prevent competition at the bidding or crying of the sale; that such combination was carried out, and rival bidding was prevented, to the injury of the defendant and certain of the creditors." The evidence (which consists of affidavits of various persons) discloses that five of the lienholders, whose liens were of the liens foreclosed in the action, no one of them being of sufficient financial ability to purchase the property, entered into an agreement or combination to the effect that one of their number, William Tyler, was to bid at the sale in behalf of all the five lienholders and bid until the amount offered for the premises would equal the mortgage liens of one Gulick, which was prior to the liens of the five who entered into the agreement, and eighty per cent of the aggregate amount of their liens. A careful reading and analysis of all the evidence contained in the affidavits presented and used during the hearing in the district court, as preserved in the bill of exceptions and record filed in this court, satisfies us that the judge who rendered the decision and confirmed the sale was fully warranted in the conclusion which he evidently formed as a basis for the disposition made of the matters in controversy, that the agreement between the five lienholders was one by which they combined to jointly purchase the property for their common benefit, and not an agreement not to bid or to ⁷¹³ avoid competition or to deter others from bidding or competing at the sale; that in so combining they had no fraudulent or illegal intent or purpose. This being established, then, the question arises whether such an agreement is forbidden by or is contrary to law, and sufficient to set aside the sale to the trustees acting or bidding for the parties to such contract. We have no doubt that in the earlier cases in which this question arose and was decided some courts of high authority have announced a doctrine which would avoid this sale solely upon the grounds of the formation of such an association, regardless of the intent or motives of the parties, assigning as a reason that its necessary and unavoidable effect is to tend to discourage or prevent competition; but the later cases have in effect overruled the above doctrine, and established what we consider a

better and more practical one, that where an examination of all the facts and circumstances shows the object of the association was to enable the parties to compete where without combining they could not do so, formed for an honest purpose and with such an intent, and not with any view to preventing competition or deterring bidders or "chilling bids," the sale will be upheld and completed: See Rorer on Judicial Sales, sec. 94; *Hunt v. Elliott*, 80 Ind. 245; 41 Am. Rep. 794; Herman on Executions, sec. 205; Freeman on Executions, sec. 297; 1 Lawson's Rights, Remedies, and Practice, sec. 220; *Phippen v. Stickney*, 3 Met. 385; *Smull v. Jones*, 6 Watts & S. 122; *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134; *Fidelity Trust and Safety Vault Co. v. Mobile S. R. Co.*, 54 Fed. Rep. 26; *Breslin v. Brown*, 24 Ohio St. 565; 15 Am. Rep. 627; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159; *Switzer v. Skiles*, 3 Gilm. 529; 44 Am. Dec. 723; *Marie v. Garrison*, 83 N. Y. 14; *Hopkins v. Ensign*, 122 N. Y. 144; *Wicker v. Hoppock*, 6 Wall. 94; *Maffet v. Ijams*, 103 Pa. St. 266; *Barling v. Peters*, 134 Ill. 606; *Neely v. McClure* (Pa., Oct. 19, 1885), 1 Cent. Rep. 230; *Ritchie v. Judd*, 137 Ill. 453; *James v. Fulcrod*, 5 Tex. 512; 55 Am. Dec. 743; *Bellows v. Russell*, 20 N. H. 427; 51 Am. Dec. 238; *Smith v. Greenlee*, 2 Dev. 126; 18 Am. Dec. 564; *Goode v. Hawkins*, 2 Dev. Eq. 393; *Smith v. Ullman*, 58 Md. 183; 42 Am. Rep. 329. The decree of the district court confirming the sale was right and is affirmed. —

CONTRACTS AMONG BIDDERS AT JUDICIAL SALE TO PREVENT COMPETITION.—An agreement among several whereby one is to buy land about to be offered at sheriff's sale for the benefit of all the parties to the contract, each furnishing his proportion of the money to the buyer, is void, as against public policy, if made to prevent fair competition in bidding, or for any other fraudulent purpose. But parties may lawfully associate to buy property at a public sale, if there is no corrupt bargain or combination among them for the purpose of preventing a fair competition among bidders, or any fraudulent purpose on their part in the transaction. So, an oral agreement that one of two joint mortgagees of personal property shall buy it at judicial sale, the other not attending or bidding, and shall hold, use, and dispose of it for the benefit of both, has been held not to be within the statute of frauds or against public policy: See note to *Barton v. Benson*, 12 Am. St. Rep. 885.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WINTRINGHAM v. HAYES.

[144 NEW YORK, 1.]

WITNESS—EXPERT EVIDENCE.—A shipwright should be permitted to answer a hypothetical question upon the condition of a yacht before and after an alleged injury, and calling for his opinion as to the cost of putting the boat into as good condition as it was assumed by the question to be in before the injury.

EXPERT EVIDENCE—HYPOTHETICAL QUESTIONS.—When the testimony of an expert is proper, counsel may assume the existence of any state of facts which the evidence tends to justify, and base their questions upon such assumption.

WITNESS—EXPERT EVIDENCE.—A SHIPMASTER who has been in charge of a yacht, which has subsequently received injuries while in charge of another, may be asked whether such injuries were the result of ordinary wear and tear.

NEGLIGENCE—EVIDENCE OF.—IN AN ACTION AGAINST A BAILEE for loss and damage to property by accident, proof of the accident may afford *prima facie* proof of negligence.

BAILOR AND BAILEE—BURDEN OF PROOF AS TO CARE.—If a bailor proves the condition in which he delivered his property to the bailee, the nature of subsequent injuries suffered by it, and that they were not the result of ordinary wear and tear, he makes out a *prima facie* case, and the burden of proof shifts to the bailee if he had the property within his exclusive control, and he must be held answerable for such injuries, unless he can show that they were not the result of his want of proper care.

J. Noble Hayes, for the appellant.

R. Burnham Moffat, for the respondent.

³ **BARTLETT, J.** This is an appeal by the defendant from a judgment of the general term of the city court of Brooklyn

4 modifying and affirming a judgment for plaintiff on trial before a referee.

The plaintiff, a yacht-builder, sued for services rendered and materials furnished to defendant's yacht *White Wing*.

The defendant contested the plaintiff's claim, and set up two counterclaims; the first alleged that plaintiff was indebted to the defendant in the sum of five hundred dollars for damages growing out of plaintiff's negligence in the performance of a contract to give a mooring-berth, and take care of defendant's yacht, *White Wing*, while out of commission; the second averred that plaintiff, through his negligence, had lost, or failed to deliver upon demand, to defendant, a yacht's small boat of the value of sixty-five dollars.

The referee allowed the plaintiff's demand, and dismissed both counterclaims.

The general term held that the first counterclaim was improperly dismissed on the ground that certain evidence was erroneously excluded, and that a presumptive case of negligence was made out against plaintiff.

Instead of reversing the judgment and ordering a new trial the general term held that the amount in dispute under the first counterclaim was thirty-six dollars, and that the judgment should be reduced by that amount and interest, making a total of forty-one dollars and sixty-five cents, and as so reduced should be affirmed, or, in default of reduction, reversed.

The plaintiff stipulated to reduce the judgment, and thereupon it was affirmed.

The general term was obviously in error in holding that thirty-six dollars and interest was the amount involved under the first counterclaim.

The defendant claimed that his yacht, while in plaintiff's custody, was seriously damaged, and demanded five hundred dollars. The defendant, under cross-examination, testified that, in a conversation with the plaintiff, the latter said that to make temporary repairs of the yacht, and to put it in shape where injuries would not go any farther, it would cost about thirty-six dollars. The defendant then adds: "I am not able to recollect fully 5 what the repairs were beyond they were temporary. It was not pretended that they would put the boat back in her original shape." This is not denied by plaintiff, although he was afterward recalled as a witness several times.

The defendant sought to prove the amount of his damages under this counterclaim by calling as a witness Maurice D. Lawrence, a shipwright. This witness was put a hypothetical question which assumed the condition of the yacht before and after her injury, and then asked what it would cost to put the boat after the damage described in as good condition as she was assumed by the question to be at the time she was laid up. This question was objected to and excluded.

We think this was error; the question was within the well-settled rule, as laid down by this court, that, when the testimony of experts is proper, counsel may assume the existence of any state of facts which the evidence fairly tends to justify: *Stearns v. Field*, 90 N. Y. 641, and cases cited.

Defendant's effort to make this proof is further evidence that the general term was mistaken in assuming that the amount in dispute was thirty-six dollars and interest.

We agree with the general term that it was error in the referee to exclude the evidence of John Macdonald (a shipmaster, who was in command of the *White Wing* the season before plaintiff took charge of her), when asked if the injuries to the yacht were the result of ordinary wear and tear.

While it is true, as a general proposition, that a bailor charging negligence on the part of a bailee rests under the burden of proof, yet oftentimes slight evidence will shift the burden to the bailee. In an action against a bailee for loss or damage to goods by accident, proof of nature of the accident may afford *prima facie* proof of negligence: *J. Russell Mfg. Co. v. New Haven Steamboat Co.*, 50 N. Y. 121.

In the case at bar if the defendant in support of his first counterclaim is able to prove the condition of the yacht when delivered to plaintiff, the nature of the subsequent injuries she sustained, and that they were not the result of ordinary wear and tear, he will have made out a *prima facie* case, and the burden of proof will be shifted to the plaintiff, who, as bailee, had the yacht exclusively within his control, and should be able to show the manner in which he discharged his contract obligations in the premises: *Curtis v. Rochester etc. R. R. Co.*, 18 N. Y. 544; 75 Am. Dec. 258; *Collins v. Bennett*, 46 N. Y. 494. We, of course, express no opinion as to the merits, but simply lay down the rule of evidence applicable to this case.

By reason of the errors disclosed in this record before the referee and at the general term there must be a new trial.

In view of this conclusion, it is unnecessary to examine the question presented by the dismissal of the second counter-claim.

The respondent's point that the appeal should be dismissed, because the matter in controversy is less than five hundred dollars, is not well taken.

The judgment appealed from is reversed, with costs to abide the event and a new trial ordered.

All concur.

Judgment reversed.

WITNESSES—EXPERTS—HYPOTHETICAL QUESTIONS.—In putting a hypothetical question to an expert the attorney may assume as proved all that the evidence tends to prove: *Quinn v. Higgins*, 63 Wis. 664; 53 Am. Rep. 305, and extended note; but there must be evidence tending to prove the supposed facts: *Meeker v. Meeker*, 74 Iowa, 352; 7 Am. St. Rep. 489, and note; *Gulf etc. Ry. Co. v. Compton*, 75 Tex. 667; *People v. Dunne*, 80 Cal. 34; *Reber v. Herring*, 115 Pa. St. 599; and it must be confined to the assumed facts upon which the expert's testimony is desired: *Mayor v. Wright*, 63 Mich. 32; and it must be so framed as to fairly reflect the facts admitted or proved by other witnesses: *Burgo v. State*, 26 Neb. 639. Hypothetical questions should be based on facts assumed to have been proven: *People v. McElvaine*, 121 N. Y. 250; 18 Am. St. Rep. 820, and note. A hypothetical question to an expert which excludes from his consideration facts already proved should not be permitted when the excluded facts are necessary to enable him to form an intelligent opinion: *Vosburg v. Putney*, 80 Wis. 523; 27 Am. St. Rep. 47. An expert may be asked his opinion based upon a particular portion, though not the whole of the testimony, the truth of which is assumed: *Yardley v. Cuthbertson*, 108 Pa. St. 395; 56 Am. Rep. 218.

NEGLIGENCE.—There is a presumption of negligence from the happening of an accident: *Ugola v. West End etc. Ry. Co.*, 160 Mass. 351; 39 Am. St. Rep. 481. This question is thoroughly discussed in the extended notes to *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490; *Huey v. Gahlenbeck*, 6 Am. St. Rep. 792, and the note to *Fleming v. Pittsburgh etc. Ry.*, 38 Am. St. Rep. 837.

BAILMENT—NEGLIGENCE—BURDEN OF PROOF.—The bailor has the burden of proving that the bailee's negligence caused a loss or injury when the bailee proves the loss or injury and the attending facts and circumstances: *Mills v. Gilbreth*, 47 Me. 320; 74 Am. Dec. 487, and note. The burden of proof of negligence is on the plaintiff in an action on the case for negligence against the bailee of a horse for hire, and is not shifted by showing that the horse was sound when delivered to the bailee, and when returned was injured in a way that does not ordinarily occur without negligence: *Malaney v. Taft*, 60 Vt. 571; 6 Am. St. Rep. 135, and note. *Contra*, *Cumins v. Wood*, 44 Ill. 416; 92 Am. Dec. 189, and note. Negligence is not presumed from the destruction of goods by fire while in the hands of a bailee for hire, and, if the bailor seeks to recover of the bailee on account of the latter's negligence, he must allege and prove it: *Lancaster Mills v. Merchants' Cotton-press Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586.

SAUNDERS v. NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

[144 NEW YORK, 75.]

ACCRETION.—To give a littoral proprietor title to land by accretion the increase must be in such imperceptible degrees that although persons are able to perceive from time to time that the land has increased on the water line, they could not perceive the progress of the accumulation at the time it was made. The filling up of a bay by cutting down the banks and bluffs above the shore does not give title by accretion within this rule.

ACCRETION—ARTIFICIAL FILLING IN OF WATERS.—TITLE TO LAND COVERED BY WATER AND BELONGING TO THE STATE cannot be acquired by accretion by the owner of the adjacent upland filling in in front of them, and thus extending them out beyond the former water line. As between him and the state, it still legally remains land under water, and subject to be dealt with as such.

GRANT OF PUBLIC LANDS—COLLATERAL ATTACK UPON.—A grant of public lands cannot be impeached collaterally unless it is void upon its face. It must be assailed, if at all, by a direct proceeding to review the determination of the commissioners of the land-office, or by an action in equity to set it aside, and the recitals in it are *prima facie* evidence of its regularity and of compliance with the preliminary requisites of the statute.

LANDS UNDER NAVIGABLE WATERS, STATE TITLE TO AND POWER OVER.—While the state holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for the public and such other purposes as it may determine to be for the best interest of the state; and the legislature may authorize the commissioners of the land-office to grant to a railroad company such lands covered by navigable waters as may be required for the purposes of the road.

RIPARIAN PROPRIETORS—OBSTRUCTION OF ACCESS OF TO NAVIGABLE WATERS.—A railway company, authorized to construct its road along or over navigable waters of the state, has no right to so construct it as to obstruct access to such waters from the uplands to the extent of interfering with the rights of the adjacent riparian proprietors. Where the roadbed passes between the uplands and the usual place of access to such waters and cannot conveniently be crossed, it is the duty of the corporation at its own expense to construct and maintain convenient passes or roads across or under the railroad for the passage of persons, cattle, carriages, and teams from the uplands to such navigable waters.

Hamilton Harris, for the appellant.

Ralph Prime, for the respondents.

79 O'BRIEN, J. The plaintiffs are the owners of certain uplands on the easterly shore of the Hudson river at Yonkers, and they brought this action to enjoin and restrain the defendant from maintaining or operating its railroad over or

upon a parcel of land sixty feet in width and about one hundred feet in length, situated below the original high-water mark and in front of their uplands. The courts below have sustained the action upon the ground that the plaintiffs have the title to the disputed parcel, and that the possession and use of the same by the defendant is wrongful. The important questions of law involved cannot be discussed or clearly understood without ⁸⁰ an accurate knowledge of the material facts. Omitting many that are merely incidental and collateral, the following facts, as to which there is no dispute, lie at the basis of the controversy. The defendant's present corporate organization dates from the year 1869, when the New York Central and Hudson River railroads were consolidated into one corporation, under the authority of the statute passed in that year. It absorbed these two corporations, and succeeded to all the rights, powers, and franchises that either or both possessed, or could exercise, and became capable of acquiring additional rights, franchises, and powers in conformity with law. The Hudson River Railroad Company was incorporated by chapter 216 of the Laws of 1846. Power was conferred upon it to enter upon any land or water for the purpose of locating its road and making surveys and maps. The location of the road at the point in question was fixed by a map filed in September, 1847. It extended from two points of land across a considerable bay formed by the river, quite a distance from the shore and below high-water mark, requiring a width of seventy-three feet in the bed of the river. At that time one Ethan Flagg was the owner of the uplands on the easterly shore of the bay, and opposite the land under water which the railroad required. He owned to high-water mark, with such incidental rights in the shore and river as pertain to riparian ownership. In August, 1847, he granted to the railroad, for the consideration of one hundred dollars, a strip of land under the waters of the river, below high-water mark, seventy-three feet wide, just westerly from and adjoining the parcel in question. Subsequently, and not later than the year 1849, the railroad was constructed by building a solid embankment of earth across the bay, upon the land under water so granted, and that part of the river east of the embankment became, as described in the findings, a landlocked bay, except that at a point north of the lands of Flagg a small culvert was constructed under the roadbed through which only small boats could pass at half tide.

While this opening permitted the flow of the water to some extent into the bay, yet it is plain that the bay was substantially cut off from ⁸¹ the channel of the river except so far as communication was possible across the railroad. It is important here to get a clear understanding of the respective rights of Flagg and his grantee, the railroad company, and the changes, if any, which this grant worked upon his riparian rights, since the plaintiffs have succeeded only to his rights. There was no stipulation in the deed binding the railroad to construct any culvert or other means of access by water from the bay to the channel of the river, but the deed reserved all the rights of the grantor to all lands below high-water mark in the river except the portion taken by the railroad for its use as then located. The railroad was released from all damages which the grantor might sustain by reason of the construction of the road through his lands and premises during the construction of the same in front of his premises. The railroad covenanted in the deed that Flagg, his heirs or assigns, might at any time erect a wharf or wharves into the river, and connect the same with the property line of the road, and that the company should make and prepare the way over its track for free passage of the grantor, his heirs and assigns, to the wharf or wharves whenever erected.

The railroad was, therefore, built in the bed of the river across the bay, in front of the grantor's uplands, with his consent, and, except as specially provided in the deed, his original riparian rights were thereby cut down and diminished to such extent as was reasonably necessary for the maintenance and operation of a railroad upon the seventy-three feet granted. This proposition, I think, is not denied, and there is really no controversy as to the right of the defendant to maintain and operate its road within the lines of the original grant. The plaintiffs' contention rests upon subsequent acts, which must now be stated.

The plaintiffs have succeeded to Flagg's title to the uplands through various mesne conveyances, and, except their claim to accretion by filling up the bay east of the railroad, which will be referred to hereafter, they have his title and no other. In June, 1868, the defendant resolved to change its line, or rather, ⁸² it seems, to make the roadbed wider, and for that purpose to acquire more land. The necessary surveys and maps for that purpose were made and filed, which included

the parcel in question, a strip east of and adjoining the seventy-three feet, which extended the roadbed toward the shore and the upland sixty feet, but all below original high-water mark. The defendant procured a patent of this strip from the commissioners of the land-office December 26, 1873, under the provisions of the General Railroad Act (Laws of 1850, c. 140, sec. 25). This is the grant upon which the defendant's claim of title is founded. But the plaintiffs also claim title, and their claim rests upon the following facts: In the year 1869, and again in 1887, they or their grantors obtained from the state, through the commissioners of the land-office, patents for a strip of land under water westerly of the original exterior line of the railroad, about one hundred and twenty feet wide and adjoining the railroad, as was apparently contemplated by the Flagg deed, but these patents did not embrace any part of the parcel in question, which is wholly easterly of the roadbed as originally constructed. In the year 1853 one of the plaintiffs' predecessors in title of the uplands filled in the bay between the original shore and the railroad, by depositing therein earth taken from the banks and bluffs on the uplands, but this filling did not entirely reclaim the submerged land, as the water, especially at high tide, continued to flow over it to some extent. But in the year 1870, when the defendant was about to increase the width of its roadbed, it made extensive additional filling on the strip in question, and raised it up on a grade with its original roadbed, and then laid down additional tracks upon it, and, having obtained the grant from the state, of December 26, 1873, has since substantially operated its railroad upon a roadbed one hundred and thirty-three feet in width. The plaintiffs have no grant whatever from the state or otherwise of the parcel, but rest their claim of title, aside from their general riparian rights, upon the reclamation of the land by filling up in 1853.

Accretion is undoubtedly one of the modes by which a title ~~is~~ to land may be acquired, but whether any title vested in the plaintiffs or any of their grantors in that way, under these circumstances, must be considered. The general rule is that, in order to give a littoral proprietor title to land by accretion, the increase must be by such imperceptible degrees that, although persons are able to perceive from time to time that the land has increased on the water line, they could not perceive the progress of the accumulation at the time it was

made: *Mulry v. Norton*, 100 N. Y. 424. The filling up of the bay by cutting down the banks and bluffs above the shore certainly did not give title by accretion within this rule. The case of *Steers v. City of Brooklyn*, 161 N. Y. 51, does not, I think, sustain the plaintiffs' contention. When the opinion in that case is examined in connection with the facts in the record and with the statutes under which the plaintiff claimed, it will be seen that the defendant simply built a pier upon lands, the title to which was in the plaintiff, and the decision was to the effect that the pier thus built became the property of the plaintiff upon whose lands it was located. It may be true that when a man builds a structure upon his neighbor's land it becomes attached to and a part of the freehold upon which it stands, and inures to the benefit of the owner of the soil in the absence of some agreement, express or implied, to the contrary.

But that principle has no application to this case, for the reason that here no one filled up any land to which the plaintiffs or any of their grantors had title, and the plaintiffs' grantors could not acquire title by filling up lands under water that belonged to the state. The plaintiffs' contention in this respect is answered by the remarks of Earl, C. J., in the case of the *People v. Commissioners of Land-office*, 135 N. Y. 447, where, after discussing some other claims of the relator, he says: "But he seems to place some reliance upon other facts. A few years before the grant to the company, he, being president of the company, caused the refuse from its foundries to be deposited in the water west of the railroad upon some of the land under water, subsequently ⁸⁴ granted to the company, and by this deposit the land was raised above the water. He certainly acquired no title to the land by thus entering upon it without any right and filling it up, and he did not thus become the proprietor of the 'adjacent land,' within the meaning of the statute above quoted. As between him and the state, it still legally remained land 'under water,' to be dealt with as such."

There is not, I think, any authority in this state to sustain the proposition that an adjacent owner can acquire title to lands under the waters of the Hudson river below high-water mark by filling it up, and the contention certainly has no foundation in reason or justice. No rights vested in the upland owner in virtue of these acts that he did not possess before.

This conclusion necessarily leaves the plaintiffs without any right to the parcel in question that can be derived from its title or ownership and goes far to defeat the action, since they can succeed only upon the strength of their own title, and not upon the weakness or defects of the defendant's. But to rest here would leave open for further controversy some important questions that are raised by the objections urged against the title of the defendant and which are necessary to decide in order to define with accuracy the rights of the parties. The learned counsel for the plaintiffs insists that the grant from the state to the defendant of the parcel in question by the patent of December 26, 1873, is absolutely void for reasons which require some consideration. Before examining these objections, however, it may be well to observe that the plaintiffs cannot impeach this grant collaterally unless it is void upon its face. It must be assailed, if at all, by a direct proceeding to review the determination of the commissioners of the land-office, or by an action in equity to set it aside, and the recitals in it are *prima facie* evidence of its regularity and of compliance with the preliminary requisites of the statute: *Blakeslee Mfg. Co. v. Blakeslee Sons' Iron Works*, 129 N. Y. 155; *New York Cent. etc. R. R. Co. v. Aldridge*, 135 N. Y. 83; *De Lancey v. Piepgras*, 138 N. Y. 26. It is not and cannot ⁸⁵ well be claimed that this action, though in equity, is to set aside the patent. It is to restrain a trespass upon the plaintiffs' rights of property. If the commissioners had the power to make the grant upon any state of facts their action concludes the plaintiffs, and this brings us to the objections urged against it by them.

The main assault is based upon the proposition that the state had the title to this land, not as proprietor, but as sovereign and trustee for the public. The contention as to the nature of the title cannot be denied, but the conclusion sought to be drawn from the fact does not follow. The question was decided in this court in *Langdon v. Mayor*, 93 N. Y. 129, and *Mayor v. Hart*, 95 N. Y. 443, and has recently been examined with great learning by the supreme court of the United States in the case of *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387.

That case involved the title to a vast tract of land under the waters of Lake Michigan, in and around the harbor of Chicago, extending a mile east of the exterior line of the original roadbed of the railroad, which the state assumed to

grant to that corporation in 1869. It was held that the ownership, dominion, and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the public interests, and subject to the paramount right of Congress to control their navigation so far as necessary for the regulation of commerce with foreign nations and among the states, and that the same rule was applicable to land under the waters of the great lakes. That the original roadbed, two hundred feet wide, with the necessary sidings and crossings which had been granted to it by the state, under a prior grant and various ordinances of the city of Chicago, was a reasonable public use, and no encroachment upon the domain of the state, and was valid. But that the grant extending one mile easterly of the line of the roadbed amounted to an abdication of its sovereignty⁸⁶ and control by the state over the waters, and, in effect, a breach of the trust under which it held the same, and therefore revocable by the action of a subsequent legislature. The doctrine of that case, with respect both to what was sustained and what was condemned, amply supports the grant in this case, even if there was any ground for supposing that our own decisions do not completely settle the question, as I think they do. The land which a railroad corporation acquires in this state, though it may be technically called a fee, is for its use as a public highway, and this is a use for the benefit of the public, though perhaps the particular purpose for which the grant was made is not very material: *Langdon v. Mayor*, 93 N. Y. 129. While the state holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public or such other purposes as it may determine to be for the best interests of the state, and the legislature has conferred power upon the commissioners of the land-office to make such grants for railroad purposes: *Shively v. Bowlby*, 152 U. S. 1. Chapter 140, sections 25 and 49, of the Laws of 1850, empowers the commissioners to grant to any railroad company formed under that act any land belonging to the people of the state which may be required for the purposes of the road, upon such terms as may be agreed upon by them. This right

vested in the defendant under the statute which authorized the consolidation, and applies to all railroads by section forty-nine.

There is nothing in any of the cases in this court to the contrary. In fact the point was not involved in any of them. In *New York Cent. etc. R. R. Co. v. Aldridge*, 135 N. Y. 83, both the upland proprietor and the railroad had a grant from the state of the same land under water, but that of the upland owner was four years earlier in point of time, and it was held that his was the superior title. Except for the prior grant the power to patent to the railroad was assumed. In the case of *Rumsey v. New York etc. R. R. Co.*, 114 N. Y. 423, when it first came before the second division, it was held that a railroad company that had constructed its roadbed along ⁸⁷ the shore of the river was not an "adjacent owner" within the meaning of the statute, and that an additional grant made to it by the state did not cut off the riparian rights of the upland owner.

When the same case was here again (133 N. Y. 79; 28 Am. St. Rep. 600; 136 N. Y. 543) it appeared that the railroad had cut off the plaintiff's access to the river by building its road upon his land without any grant or condemnation proceedings, and we held he was entitled to damages. None of these cases question the right of the state to make grants of land to railroads for railroad purposes, and in all of them the right is recognized.

It is said that the commissioners were expressly prohibited from making grants of land under the waters of the Hudson river to any one but the adjacent riparian owner, and the defendant, not being such owner, could take no title by the grant. This prohibition is found in the Revised Statutes, passed at a time when grants for railroad purposes were not contemplated: 1 Rev. Stats. 208, sec. 67; but no such limitation is to be found in section 25 of the act of 1850, authorizing grants for railroad purposes. To hold that a railroad company could not take from the grant of the state in such cases, unless it was an upland proprietor, would render the statute practically inoperative. That was a subsequent and independent enactment for a special purpose, enlarging the power of the commissioners, and the restrictions, qualifications, and limitations contained in the Revised Statutes as to upland ownership were not imported into it. The defendant's patent from the state was, therefore, valid and effectual

to vest it with all the rights that the state had in the parcel in question. But it could not extinguish or impair the easement or riparian rights which the plaintiffs or their grantors had as owners of the uplands and bank of the river.

What these rights are has been decided in *Rumsey v. New York etc. R. R. Co.*, 133 N. Y. 79, 28 Am. St. Rep. 600, and since that decision reaffirmed in the case of the *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 387. They embrace the right of access to the channel or navigable part of the river for navigation, fishing, and such other uses as ^{are} commonly belong to riparian ownership, the right to make a landing, wharf, or pier for his own use or for that of the public, with the right of passage to and from the same with reasonable safety and convenience. But the trial court has found that the title to this parcel of land was not in the defendant, but in the plaintiffs, and, so far as the judgment rests upon these findings, it cannot be sustained. It practically deprives the defendant of all use or possession of the land for any purpose, and requires it to wholly discontinue the operation of its railroad upon it. We have already seen how the rights of the upland owner were affected by the grant from Flagg, under which the defendant acquired the right to operate its road upon the original seventy-three feet. The only ground of complaint that the plaintiffs have is with respect to such additional obstructions to the enjoyment of their riparian rights as have since that time been created by the defendant's acts in adding to the width of its roadbed in the manner described and in the manner of its use. The plaintiffs cannot complain of the operation of the road by the passage of trains, since their remote grantor consented to it by his grant to the defendant, without limitation or restriction of any kind. Whether any additional obstruction to the enjoyment of the rights incident to upland ownership have been created by the defendant since it obtained the grant of December 26, 1873, was, I think, under the circumstances, a question of fact.

The fact that the defendant is now operating its road upon a bed sixty feet wider than before the grant, but upon its own land, does not furnish any substantial ground for equitable interference. The trial court has found, however, that the rails and ties placed by the defendant on its roadbed so project above the surface of the ground as to impede the passage of men, horses, and carriages over the road, and to obstruct

access to the river from the upland, and that at times it maintains standing cars thereon, thus interfering with the plaintiffs' riparian rights. This does not warrant that part of the judgment which enjoins the defendant absolutely from operating its road upon the sixty feet, and requires it to remove the track ⁸⁹ and ties, and never to replace them, but it does entitle them to some measure of relief. The defendant, under the covenant in the deed from Flagg, as well as by its general relations and obligations to the plaintiffs as riparian owners, is bound to construct and maintain a suitable, safe, and reasonably convenient way or ways over its railroad which will furnish access to the water-front for all such purposes as the plaintiffs have the right to resort to it as a public highway. Moreover, substantially the same duties and obligations have been imposed upon the defendant by the law of its creation: Laws of 1846, c. 216, secs. 14-16. Wherever it crosses bays or streams it must, so far as practicable, restore them to their former usefulness. The owners of docks or water rights upon the river, outside the railroad, are protected by requiring the defendant to extend and improve the same when cut off, and generally to restore and preserve all property rights, so far as practicable.

Where the roadbed passes between the uplands and the usual place of access to the river, and cannot be conveniently crossed, it is the duty of the corporation, at its own expense, to construct and maintain convenient passes, or roads, across or under the railroad for the passage of persons, cattle, carriages, and teams from the uplands to the river front. The findings in this case are to the effect that the defendant has not performed these duties and obligations, so far as the plaintiffs are concerned, and that it has interfered with the enjoyment of their riparian rights to the extent and in the particulars mentioned. The extent of the relief to which they are entitled is that the defendant shall be required by the judgment to perform these duties and obligations.

This result is in harmony with the doctrine of the case of *Rumsey v. New York etc. R. R. Co.*, 114 N. Y. 423. There is a marked difference between that case and this, at least in the form of the action. In the former the plaintiff attempted to protect his riparian rights by an action to recover damages. In this case there is no claim made for damages sustained, but the owner has asked simply equitable relief against any future invasion of his easements. In the former

case we held, that so far as the owner had sustained ⁹⁰ damages in consequence of any encroachments by the defendant, that he was entitled to recover. In this case we hold that in so far as the facts found justify the conclusion that the defendant has invaded the plaintiffs' rights, or is invading them, they are entitled to relief. In that case it had been adjudged in previous actions that the defendant was obstructing access to the river without any right or title whatever as against the upland owner. In the present case we hold that the defendant has a valid grant of the land from the state, good against all the world, except the plaintiffs' right of access to the river, and that, so far as necessary for the protection of these rights, the plaintiffs are entitled to prevail.

The judgment should, therefore, be modified in such manner as to give to the plaintiffs this relief, and this alone. The order should be so framed as to accomplish this result, and, if its terms cannot be agreed upon by the parties, then it must be settled by one of the judges of this court.

The judgment, as thus modified, should be affirmed, without costs to either party.

PECKHAM, J. The court below and the counsel for the plaintiff upon the argument before us have, as it seems to me, misconceived the extent and nature of the decisions of this court in *Rumsey v. New York etc. R. R. Co.*, 114 N. Y. 423, *New York Cent. etc. R. R. Co. v. Aldridge*, 135 N. Y. 83. While concurring in the views set forth in the very satisfactory opinion of Judge O'Brien, I only desire to say a word specially regarding those two cases. The point therein decided was that the ancestors or grantors of the individual parties to those actions had not by their grants to the railroad company of the strips of land under water or along the line of and below and above high-water mark, deprived themselves of or clothed the railroad company with the character of riparian owners. We accordingly held that these individual parties could in their character of riparian owners still take title to lands under water which were adjacent to their upland, and the intervention of the railroad embankment did not form an obstacle. We did not decide that the ⁹¹ railroad company, under the provisions of sections 25 and 49 of the General Railroad Act of 1850, could not take a grant of the title of the state for the purposes of the road from the commissioners of the land-office covering land under water upon

such terms as they might agree to. In both of the cases there was a grant to the individuals of land under water, and they claimed title under their patents from the state. In the Rumsey case the defendant had no pretense of title, and relied upon the defense that the plaintiffs were not riparian owners, and therefore obtained no title by virtue of the patent from the land commissioners. In the Aldridge case the defendant had a patent which was attacked as not carrying any title because it was asserted the defendant was not a riparian owner, and could take no title by such patent to the lands under water. Although the plaintiff in the Aldridge case had a patent it was subsequent to the one granted to defendant. In both cases the patents to the individuals were held good because the patentees were, notwithstanding the grants to the railroad company, held to have continued to be upland proprietors within the meaning of the statute. In the case at bar the plaintiffs have no patent from the state granting to them the title to any lands under water, and they never had any title to such lands and have none now. They simply have those rights as riparian owners which Judge O'Brien has described, while the defendant has obtained the title of the state to the lands under a patent good by reason of the provisions of the Railroad Act of 1850.

All concur.

Judgment accordingly. —

ACCRETIONS.—LANDOWNER, WHEN ENTITLED TO: See *Coulthard v. Stevens*, 84 Iowa, 241; 35 Am. St. Rep. 304, and extended note.

PUBLIC LANDS—GRANT OF—COLLATERAL ATTACK ON.—A patent issued to public lands by the proper officers is conclusive in a court of law, and cannot be collaterally attacked: *Gale v. Best*, 78 Cal. 235; 12 Am. St. Rep. 44, and note, with the cases collected; *Chever v. Horner*, 11 Col. 68; 7 Am. St. Rep. 217, and note.

WATERS.—LANDS UNDER NAVIGABLE WATERS BELONG TO THE STATE: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541; *Lewis v. City of Portland*, 25 Or. 133; 42 Am. St. Rep. 772. See, also, the notes to *Commonwealth v. Manchester*, 23 Am. St. Rep. 838, and *Miller v. Mendenhall*, 19 Am. St. Rep. 228.

WATERS—RIPARIAN RIGHTS—ACCESS TO NAVIGABLE WATERS.—A riparian owner of lands on navigable waters has a right of access thereto for the purpose of making a landing, pier, or wharf, for his own or the public use, subject to such rules as the legislature may impose, and he is entitled to compensation for any interference with such right: *Rumsey v. New York etc. R. R. Co.*, 133 N. Y. 79; 28 Am. St. Rep. 600, and note; to the same effect, see *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333, and note, with the cases collected. See especially the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 231.

PEOPLE v. GARDNER.

[144 NEW YORK, 119.]

EXTORTION, ATTEMPT TO COMMIT.—THIS CRIME DEPENDS ON THE MIND AND INTENT OF THE WRONGDOER, and not on the effect or result upon the person sought to be coerced. Hence, a person may be guilty of an attempt to commit it though he does not, as he intends, produce fear on the part of the person from whom he attempts to extort.

CRIMINAL LAW.—THE ATTEMPT TO COMMIT A CRIME has been made when the opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, though he is baffled by an unexpected obstacle or condition.

EXTORTION.—WHERE ALL THE ELEMENTS OF THE CRIME OF AN ATTEMPT to commit extortion are present the person having the guilty intent cannot escape conviction on the ground that the person of whom he sought to extort was acting as a decoy, and therefore was not put in fear by the threats of the accused.

CONSTITUTIONAL LAW.—ACQUSED GIVING EVIDENCE AGAINST HIMSELF. WHAT IS NOT A COMPELLING.—The fact that a person on trial charged with a criminal offense is compelled to arise for the purpose of enabling a witness to identify him is not a violation of a constitutional provision declaring that he shall not be compelled to be a witness against himself. Every court has the power to require every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court or jury.

CRIMINAL PROSECUTION—EVIDENCE.—Where, on the part of the prosecution, evidence is received that the accused was frequently in the company of a person whom he is charged with attempting to extort money from, and that he visited her at her house, and in saloons, etc., it is error to exclude evidence on the part of the defendant that in these acts he was under the direction of the officers of a society for the prevention of crime, and seeking to aid them in bringing other persons to justice.

Henry B. B. Stapler, for the appellants.

John W. Goff, for the respondent.

123 **EARL, J.** The defendant was indicted for, and, upon his trial, convicted of, an attempt to commit the crime of extortion in the city of New York, on the fourth day of December, 1892, by attempting to obtain one hundred and fifty dollars from Catharine Amos by threatening to accuse her of keeping a house of prostitution. The following are the sections of the Penal Code under which he was convicted:

“Sec. 552. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.”

“Sec. 553. Fear, such as will constitute extortion, may be

induced by a threat" [among other things] "to accuse a person of any crime."

"SEC. 34. An act done with intent to commit a crime, and tending, but failing, to effect its commission, is an attempt to commit that crime."

"SEC. 685. A person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury and directs the defendant to be tried for the crime itself."

Catharine Amos, who was the principal witness for the people, testified that for nine years she had been the keeper of a house of prostitution in the city of New York, and that ¹²⁴ the defendant, in December, 1892, came to her and agreed with her that if she would pay certain sums of money to him, and especially the sum of one hundred and fifty dollars, he would not accuse her of the crime, and that, from October 19, 1892, to December 4, 1892, she had been acting as a decoy of the police and trying to induce the defendant to receive money from her under such circumstances as would render him guilty of a crime, and enable the police to arrest and convict him of it.

The evidence tended to show the existence of every element constituting the crime of extortion except that Mrs. Amos in paying the money exacted by the defendant was not actuated by fear.

It is urged on behalf of the defendant that the fact that his threats did not inspire fear inducing any action on the part of Mrs. Amos, an element essential to constitute the completed crime of extortion, renders it impossible to sustain an indictment and conviction for the lesser crime of an attempt at extortion; and so a majority of the judges constituting the general term held. We are of opinion that those learned judges fell into error.

The threat of the defendant was plainly an act done with intent to commit the crime of extortion, and it tended, but failed, to effect its commission, and, therefore, the act was plainly within the statute an attempt to commit the crime. The condition of Mrs. Amos' mind was unknown to the defendant. If it had been such as he supposed, the crime could have been, and probably would have been, consummated. His guilt was just as great as if he had actually succeeded in his purpose. His wicked motive was the

same, and he had brought himself fully and precisely within the letter and policy of the law. This crime, as defined in the statute, depends upon the mind and intent of the wrongdoer, and not on the effect or result upon the person sought to be coerced. As said in *People v. Moran*, 123 N. Y. 254, 20 Am. St. Rep. 732, where the defendant was convicted of an attempt to commit the crime of larceny by thrusting his hand into the pocket of a woman which was not shown to contain any thing, "the question ¹²⁵ whether an attempt to commit a crime has been made, is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his design. . . . An attempt is made when an opportunity occurs and the intending perpetrator has done some act tending to accomplish his purpose, although he is baffled by an unexpected obstacle or condition." In *Commonwealth v. Jacobs*, 9 Allen, 274, the defendant was convicted of soliciting a person to leave the commonwealth for the purpose of enlisting in military service elsewhere, although such person was not fit to become a soldier, and there it was said: "Whenever the law makes one step toward the accomplishment of an unlawful object, with the intent or purpose of accomplishing it, criminal a person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance." It is now the established law, both in England and in this country, that the crime of attempting to commit larceny may be committed, although there was no property to steal, and thus the full crime of larceny could not have been committed: *Regina v. Brown*, L. R. 24 Q. B. Div. 357; *Regina v. Ring*, 66 L. T. 300; *Commonwealth v. McDonald*, 5 Cush. 365; *People v. Jones*, 46 Mich. 441; *State v. Wilson*, 30 Conn. 500; *Clark v. State*, 86 Tenn. 511; *State v. Beal*, 37 Ohio St. 108; 41 Am. Rep. 490; *Rogers v. Commonwealth*, 5 Serg. & R. 463; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22. In *Rex v. Holden*, Russ. & Ry. 154, it was held on an indictment under a statute against passing or disposing of forged bank notes, with intent to defraud, that it was no defense that those to whom the notes were passed knew them to be forged, and therefore could not be de-

frauded. In *Regina v. Goodchild*, 2 Car. & K. 293, and *Regina v. Goodall*, 2 Cox C. C. 41, it was held under a statute making it a felony to administer poison or use any instrument with intent to procure the miscarriage of any woman, that the crime could be ¹²⁶ committed in a case where the woman was not pregnant. It has been held in several cases that there may be a conviction of an attempt to obtain property by false pretenses, although the person from whom the attempt was made knew at the time that the pretenses were false, and could not therefore be deceived: *Regina v. Hensler*, 11 Cox C. C. 570; *Regina v. Banks*, 12 Cox C. C. 393; *Regina v. Francis*, 12 Cox C. C. 613; *Regina v. Ransford*, 13 Cox C. C. 9; *Regina v. Jarman*, 14 Cox C. C. 112; *Regina v. Eagleton*, Dears. C. C. 515; *Regina v. Roebuck*, Dears. & B. C. C. 24; *Regina v. Ball*, 1 Car. & M. 249; *People v. Stites*, 75 Cal. 570; *Hamilton v. State*, 36 Ind. 280; 10 Am. Rep. 22; *People v. Bush*, 4 Hill, 183; *People v. Lawton*, 56 Barb. 126; *McDermott v. People*, 5 Park. Cr. 104; *Mackesey v. People*, 6 Park. Cr. 114. And to the same effect are the text-books on criminal law: 1 Bishop on Criminal Law, sec. 723, et seq. So far as I can discover there is absolutely no authority upholding the contention of the learned counsel for the defendant, that because the defendant did not inspire fear in the mind of Mrs. Amos by his threats, and thus could not have been guilty of the completed crime of extortion, therefore he cannot be convicted of attempting to commit the crime. That contention is, as I believe, also without any foundation in principle or reason.

Therefore, upon the facts alleged in the indictment and appearing upon the trial, the defendant could be convicted of an attempt to commit the crime of extortion, and the general term, in reversing the judgment, should not, therefore, have refused to grant a new trial and have discharged the defendant.

Our attention has been called on behalf of the defendant to many other exceptions taken by his counsel during the progress of the trial which, it is claimed, point out errors. We have examined all of them, but do not deem it important to call particular attention to but two.

Upon the trial it was proved that defendant and Mrs. Amos were together upon certain occasions having a material bearing upon the case, and a witness was called to identify the defendant as the person who was in her company at one of

the times ¹²⁷ and places referred to. The witness was asked: "Do you know Mr. Gardner"? A. "I do not." Q. "Would you know him if you saw him"? A. "Yes, sir." Then the court directed the defendant to stand up. The defendant's counsel objected to his standing up, or that he should be compelled to stand up, or to testify against himself. The court replied: "The prisoner will rise; stand him up." And then, against the objection of his counsel, the defendant was forcibly compelled to stand up, and then he was identified by the witness. It is now claimed on his behalf that this action on the part of the court violated his constitutional rights, by compelling him to be a witness against himself: N. Y. Const., art. 1, sec. 6; U. S. Const., amendment 5. We do not think that the defendant's constitutional right was violated, or that he was compelled, within the meaning of the constitutional provisions referred to, to give evidence against himself. He was bound to be in court and in the presence of the jury, the recorder, and the witnesses who might be there. The recorder, the jurors, and the witnesses had the right to see him and he had the right to see them. It was necessary that he should be identified as the person named in the indictment and charged with the crime. His mere standing up did not identify him with the alleged crime, and did not disclose any act connected with the crime. There was nothing on his person or in his appearance that in any way connected him with the crime, or furnished any evidence whatever of his guilt. Suppose he had come into court with his face veiled, could not the recorder compel him to remove the veil that his face might be seen? Could he not compel him to remove his hat; to stand or sit in the prisoners' dock? In the examination of the witness could not the district attorney have pointed to the defendant and asked the witness whether he was the person he had seen with Mrs. Amos? Instead of compelling the defendant to stand up, could not the recorder have directed the witness to go to the place where he was and look at him with the view of identifying him? If all these things could be done without violating ¹²⁸ the rights of the prisoner, how is it possible to say that he was harmed, or that his constitutional right was invaded by compelling him to stand up for the purpose of identification? For the orderly conduct of a criminal court it is requisite that the trial judge should have the power to say what place the prisoner shall occupy in the courtroom,

and whether at any time he shall stand or sit, and be covered or uncovered; and he must have the power at all times to keep the prisoner within sight of the court, the jury, the counsel, and the witnesses. The history of the constitutional provision referred to clearly demonstrates that it was not intended to reach a case like this: Story's Constitutional Limitations, sec. 1788; 1 Stephen's History of Criminal Law, 440. The main purpose of the provision was to prohibit the compulsory oral examination of prisoners before trial, or upon trial, for the purpose of extorting unwilling confessions or declarations implicating them in crime. It could reach further only in exceptional and peculiar cases coming within the spirit and purpose of the inhibition. A murderer may be forcibly taken before his dying victim for identification, and the dying declarations of his victim may then be proved upon his trial for his identification. A thief may be forcibly examined and the stolen property may be taken from his person and brought into court for his condemnation. A prisoner's person may be examined for marks and bruises, and then they may be proved upon his trial to establish his guilt; and it would be stretching the constitutional inhibition too far to make it cover such cases, and cases like this, and the inhibition thus applied would greatly embarrass the administration of justice. In *Rice v. Rice*, 47 N. J. Eq. 559, Beasley, C. J., said: "That every court of judicature, as an indispensable attribute, is possessed of the power to require every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court or to the jury, if there be one, would not seem in any degree questionable. Without such exposure there would be no certainty who the person really was who assumed to act as party or witness. To order such persons to expose their faces to view is common ¹²⁹ usage in every court, and thus far the practice seems not to be open to any question." Our attention is called to authorities bearing more or less upon the question we are now considering, and we find that they are not all harmonious. In *State v. Jacobs*, 5 Jones, 259, it was held that a judge has no right to compel a defendant in a criminal prosecution to exhibit himself to the inspection of the jury for the purpose of enabling them to determine his *status* as a free negro. There the defendant was indicted as a free negro for carrying arms, and it became necessary for the prosecution to show that he was a negro, and in that state

a man was held to be a negro who had as much as one sixteenth part of African blood in his veins. There the defendant was compelled to stand up that the jury might see whether he was a negro or not, and to determine that fact from their own observation. Thus there was a sense in which it could be said that the defendant was compelled to furnish evidence against himself upon a vital issue to be tried, and so that case is distinguishable from this. But no authority was cited to uphold that decision, and we entertain no doubt that it was erroneous. The judge writing the opinion said: "Admitting that the state has a right to compel his presence at the trial, it does not follow that he is bound to stand or sit within view of the jury." Can this observation be correct? Certainly in this state it cannot be maintained that a prisoner, when on trial, could not be compelled to stand or sit in view of the jury. It is the right of the prisoner to be in the presence and view of the jury, and it is the right of the prosecution to have him in the view of the presiding judge and jury and the counsel engaged in the trial. And whether at any particular time he shall stand up or sit down in the presence of the jury must be a matter resting in the discretion of the trial judge, and in no sense can it be said that by the exercise of such discretion his constitutional right is involved.

In the case of the *State v. Johnson*, 67 N. C. 55, the defendant was on trial for rape, and on the trial the prosecutrix was asked by the prosecuting attorney to look around the ¹²⁰ courtroom and see if she could identify the guilty party, and she pointed to the prisoner and said, "That is the black rascal." It was insisted that this was to make the prisoner furnish evidence against himself; that he had the right to be there and confront his accusers, and that for the state to take advantage of his presence to have him pointed out and identified placed him in the dilemma of either abandoning his constitutional right to be present or of affording the means of his conviction by its exercise. The court held against this contention, and that no error was committed. Suppose in that case the court had placed the prisoner where he would have been conspicuously in view of the court, the jury, and the witnesses, and the prosecutrix had then identified him, would his constitutional right have been invaded? And if he had been compelled to stand up would he have been compelled, within the meaning of the constitution, to give evidence against himself? We think not. We are,

therefore, of opinion that no error was committed in the case in compelling the defendant to stand up for identification.

It appeared upon the trial by the witnesses for the prosecution that prior to the time of the alleged offense the defendant was much in the company of Mrs. Amos; that he visited her at her house; that she visited him at his house; that he frequently rode with her through the streets of New York, and visited saloons and drank wine with her. These facts were proved on the part of the prosecution to show his relations with Mrs. Amos, and his motives, and as links in the chain showing the commission of the alleged crime. The defendant offered to show by himself and other witnesses that in his relations with Mrs. Amos he was acting under the directions of officers of the Society for the Prevention of Crime, for the purpose of gaining her confidence and goodwill, and securing from her an affidavit which could be used for the arrest of a former agent of that society who was supposed to be engaged in extorting money from keepers of houses of prostitution by threats of prosecution, and the recorder excluded the evidence. It is now claimed that in such exclusion error was committed. ¹⁸¹ We think the evidence should have been received. The defendant should have been permitted to prove that he acted under the general instructions of the Society for the Prevention of Crime, whose agent he was, and that he reported his acts to its officers and followed their directions. Such proof would have had a tendency to put an innocent aspect upon his acts which would otherwise seem to be a part of the scheme to commit the crime with which he was charged. It is claimed on behalf of the people that the exclusion of this evidence was not harmful to the defendant as the facts were nevertheless proved. We have carefully read all the evidence, and we are not satisfied that the defendant did not suffer harm from the rulings complained of. The recorder had laid down the law by these rulings, and the defendant did not have the benefit of the evidence offered in the submission of the case to the jury. The case went to the jury with the rulings of the recorder during the progress of the trial that that kind of evidence was incompetent and illegal.

Other things transpired during the progress of the trial to which our attention has been called, which, though not presenting legal errors which would call for a reversal of the judgment of conviction, were yet of such a character that

they may have been harmful, and probably were harmful, to the defendant. We will not comment upon them, as they may not, and probably will not, appear upon another trial.

On account of the error above pointed out, while the general term should have reversed the judgment below, it should also have granted a new trial.

Our conclusion, therefore, is that the order of the general term should be so modified as simply to reverse the judgment of conviction and to grant a new trial.

All concur.

Ordered accordingly. —

EXTORTION DEFINED: See the extended note to *Commonwealth v. Mitchell*, 96 Am. Dec. 193.

CRIMINAL LAW—WHAT CONSTITUTES AN ATTEMPT TO COMMIT CRIME.—Where the criminal result of an attempt is not accomplished, simply because of an obstruction in the way of the thing to be operated upon, which is unknown to the aggressor at the time, the criminal attempt is committed: *People v. Lee Kong*, 95 Cal. 666; 29 Am. St. Rep. 165. An attempt to commit crime is the direct movement toward its commission after preparations for the same have been made: *State v. Lung*, 21 Nev. 209; 37 Am. St. Rep. 505. This question is fully discussed in the extended note to *People v. Moran*, 20 Am. St. Rep. 741

CRIMINAL LAW.—DEFENDANT AS WITNESS AGAINST HIMSELF: See the note to *People v. Mullings*, 17 Am. St. Rep. 230, and the extended notes to *State v. Duncan*, 38 Am. St. Rep. 895; *State v. White*; 27 Am. Rep. 140, and *Commonwealth v. Nichols*, 19 Am. Rep. 348.

GERMANIA FIRE INS. CO. v. HOME INS. CO.

[144 NEW YORK, 195.]

INSURANCE, FORFEITURE FOR CHANGE OF INTEREST.—The taking of a partner by the assured and the transfer to him of an interest in the property avoids a policy if it contains a provision that if the property is sold, or transferred, or any change takes place in title or possession, the policy shall be void, though the policy also stipulates that the insurer will make good to the assured, his heirs, executors, administrators, and assigns all such immediate loss as shall result from the destruction of the premises from the perils insured against.

G. W. Cotterill, for the appellant.

George Richards, for the respondent.

197 BARTLETT, J. This is an appeal from the judgment of the superior court of the city of New York affirming a judg-

ment dismissing the complaint after trial on an agreed written statement of facts.

The material facts are as follows, viz: The defendant insured Verdier on his stock of hardware, and, during the life of the policy, Verdier took in a copartner, Brown, transferring to him a three-tenths interest in the insured property; shortly after this transfer the fire occurred.

The policy contained this provision, viz: "Or if the property be sold or transferred, or any change takes place in title or possession, . . . this policy shall be void."

The question presented by this appeal is whether the fact of the insured having taken in a partner rendered the policy void.

It was stated on the argument that this precise point had never been presented to this court, but it is insisted that the ~~198~~ trend of some of our decisions is in favor of plaintiff's contention that the policy is not avoided by taking in a new partner.

The first case is *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337. It was there held that the effect of the usual proviso against sales in policies of insurance is not to interdict sales by the owners as between themselves; that the design of the provision was to prevent sales to parties not insured.

The second case is *Walton v. Agricultural Ins. Co.*, 116 N. Y. 326. This was a case in the second division. The policy contained the clause against transfer.

While the policy was in force, Walton, through a third person, conveyed the insured property to his wife, and subsequently the fire occurred.

The plaintiff sought to relieve themselves from the effect of this transfer by showing that Walton informed the defendant's solicitor of his intention to convey to his wife after a few months, and requested that the policy be so drawn as to cover his interest before conveyance and that of his wife afterward, and that the solicitor informed him that the result could be accomplished by naming him and his wife as the parties insured.

The trial court admitted the evidence, and this court reversed the judgment on the ground that it was error to admit parol evidence to vary or contradict one of the provisions of the policy.

While the decision of this case went off on a question of

evidence, it is clear that the wife of Walton had no insurable interest at the time the policy was issued, and that the subsequent transfer to her was not a transaction between the insured, but was a sale by the insured to a stranger to the policy. As the case was properly disposed of on the question of evidence the court did not pass on this point.

The third case is *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, 32 Am. St. Rep. 752, where it was decided that the issuing of an execution, and a levy thereunder, did not work a change of title or interest within the meaning of the policy.

¹⁹⁹ None of these cases deals with the question now under consideration.

We think it perfectly clear on principle that the sale of an interest in the insured property by Verdier to Brown and the formation of a copartnership between the two rendered the policy void.

The contract of insurance is peculiarly personal in its nature, and the success of the business of underwriting depends largely upon what is known as the moral hazard.

It is a well-established principle of the common law that every man has the right to determine with whom he will enter into contract obligations.

An insurance company is induced to issue or withhold its policy after carefully scrutinizing the character of the applicant for insurance.

It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured.

It would be a harsh and indefensible rule that required the underwriter, who had insured an individual on a stock of goods in a store, to continue the insurance after the insured had taken in two partners, and formed a firm wherein each partner was vested with an undivided third interest in the property covered by the policy, without having been afforded the opportunity to examine into the moral and business characters of two strangers to the original contract.

This right of the insurance company was in nowise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy.

It is only when a stranger is to be brought into contractual

relations with the insurance company that the consent of the latter is essential.

This right of the company has been upheld in other jurisdictions: *Drennen v. London Assur. Corp.*, 20 Fed. Rep. 657; *Card v. Phœnix Ins. Co.*, 4 Mo. App. 424; *Malley v. Atlantic Fire and Marine Ins. Co.*, 51 Conn. 222, 250, 251.

200 The appellant urges that the protection of the policy should be extended to the new partner by virtue of the following words contained therein, viz: "And the said Home Insurance Company hereby agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss," etc. It is argued that the word "assigns" extends the insurance to the new partner's interest.

The policy is capable of no such construction; the clause in question is merely a covenant on the part of the company with the insured to pay to him or his legal representatives or assigns the amount of the loss that may become due to him under the terms of the policy.

The judgment and order appealed from should be affirmed, with costs.

All concur.

Judgment accordingly. —

INSURANCE—CONDITION AGAINST CHANGE OF INTEREST.—A condition in a policy of insurance against the sale or transfer of the property insured is not broken by the sale of part of the interest of the assured therein, as where he takes a partner, and the property insured becomes vested in the partnership: *Blackwell v. Insurance Co.*, 48 Ohio St. 533; 29 Am. St. Rep. 574, and note, with the cases collected.

LONDON AND LANCASHIRE FIRE INS. CO. v. ROMB, WATERTOWN, AND OGDENSBURG R. R. CO.

[144 NEW YORK, 200.]

CARRIERS—WHEN BECOME LIABLE AS SUCH.—Though a shipper has agreed to load his property in the cars, and has not yet done so, the carrier is liable for its loss if it has been placed in his freight-house for the purpose of shipment, with the consent and under the direction of his freight agent, and it is ready for immediate transportation, and the cause of delay is the failure of the carrier to furnish the requisite cars.

CARRIERS.—THE LIABILITY OF A CARRIER AS SUCH IS NOT PREVENTED FROM ATTACHING by the fact that it is not ready to perform its duty and retains the property in its possession because not then able to provide the means of transportation.

D. G. Griffin, for the appellant.

A. H. Sawyer, for the respondent.

²⁰⁴ **EARL, J.** This action is brought to recover damages against the defendant for the destruction by fire of a large quantity of hay, alleged to have been delivered to it as a common carrier for transportation.

It is admitted that if, at the time of the destruction of the hay, it was in the possession of the defendant as a common carrier, it is liable in this action; and the sole question for our determination is whether the hay had been so delivered to the defendant and placed in its custody as to make it liable as a common carrier. The plaintiff sues as assignee of the shippers and stands in their place.

The hay, at the time of its destruction, was in the defendant's ²⁰⁵ freight-house at Cape Vincent, and had been placed there by the plaintiff's assignors with the consent and under the direction of the defendant's freight agent at that place. It was delivered in bales, and it was the usage and the regulation of the defendant, known and assented to by the shippers, that they were to load it into the defendant's cars. The claim of the defendant is that its responsibility as a common carrier had not attached to it at the time of the fire, for the sole reason that the duty of loading the hay into its cars rested upon the shippers, and that its duty as a common carrier could not attach until the hay was thus loaded.

There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and that it cannot generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shipper a contract to place the freight into its cars. But we know from our own observation that as to hay, lumber, sawlogs, live animals, and other bulky freight, the shipper usually loads the freight into the cars. We need not, however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railroad company takes on the character of a common carrier. The rule as to the responsibility of the carrier is

laid down in varying phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. The liability of a railroad company ²⁰⁶ as common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents, or servants, at the place appointed or provided for their reception when they are in a fit and proper condition, and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner or consignor, the deposit must be considered to be in the mean time for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former, while they are in his custody, is only liable as warehouseman, and his only responsibility as carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of

the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation ²⁰⁷ between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them. The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*: *Judson v. Western R. R. Co.*, 4 Allen, 520; 81 Am. Dec. 718; *Barron v. Eldredge*, 100 Mass. 455; 1 Am. Rep. 126; *Grosvenor v. New York Cent. R. R. Co.*, 39 N. Y. 34; *O'Neill v. New York Cent. etc. R. R. Co.*, 60 N. Y. 138; Redfield on Carriers, 80; Angell on Carriers, sec. 129. In *Wilson v. Atlanta etc. Ry. Co.*, 82 Ga. 386, a case somewhat relied on by defendant's counsel, a quantity of wood was piled along the line of the defendant's railroad for the purpose of having it transported thereon, and the shipper was to place the wood in the defendant's cars. There the action was brought to recover damages on account of unreasonable delay in transporting some of the wood, and, also, for the loss of some portion thereof. The plaintiff failed to recover on the ground that upon all the facts in that case the wood had not been delivered to and accepted by the railroad company for immediate shipment; and no principle was laid down in that case which can be invoked for the protection of the defendant in this. Here the hay was delivered to the defendant for immediate shipment, and it was accepted by it and placed in its freight-house. It was not stored for the accommodation and convenience of the shippers. They were there ready, willing, and anxious to put the hay into the cars as fast as the defendant would furnish them. There was no delay whatever by the request of the shippers or on account of any act or omission on their part. Whatever delay there was in the shipment was due exclusively to the omission of the defendant to promptly furnish cars for the transportation. Although a railroad company may not be ²⁰⁸ able promptly to transport freight delivered to it, and there may be considerable delay

and even long storage of the freight until cars can be furnished, nevertheless it takes on the character of a common carrier the moment the property is delivered and received by it for immediate transportation. It can make no difference whether the railroad company was to place this hay in its cars, or whether the shippers were to do that work. Whoever was to load the hay into the cars, it was delivered and received for immediate shipment, not for storage, not to be kept for the shippers, and not subject to their control, and it was not in their custody. It was simply left in the freight-house of the railroad company until it could furnish cars for its transportation. It was there for immediate shipment, with nothing more to be done than to place it in the cars, and whether that work was to be done by the railroad company or by the shippers can make no difference in reason or principle. If, however, in such a case the delay in the shipment is caused by some fault of the shippers, if they are not ready to place the freight in the cars when they are furnished, and thus shipment is delayed until the property, without the fault of the carrier, is destroyed, the loss would then fall upon the shippers, because it was due to their default.

In this case, at the time of the fire, the property was stored for the convenience of the carrier, and not for the convenience of the shippers, and its destruction was due to its default, and in no way to any default on their part.

We, therefore, see no reason to doubt that this recovery was right, and that the judgment should be affirmed, with costs.

All concur (PECKHAM and BARTLETT, JJ., in result), except O'BRIEN, J., taking no part.

Judgment affirmed.

CARRIERS—WHEN LIABILITY BEGINS—DELIVERY TO.—Delivery to and acceptance by a carrier are essential to make him liable for goods, but acceptance may be either actual or constructive: *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344, and note. Delivery of goods to a carrier by leaving them on the dock near his boat, according to the usual custom, will not render him liable unless accompanied by express notice: *Packard v. Getman*, 6 Cow. 757; 16 Am. Dec. 475, and note. Delivery of goods to a servant or duly authorized agent of a carrier, who is in the habit of receiving such goods in the ordinary scope of his employment, is a sufficient delivery to make the carrier responsible for their loss: *Minter v. Pacific R. R.*, 41 Mo. 503; 97 Am. Dec. 288, and note. For a further discussion of this subject see the notes to *Illinois Cent. R. R. Co. v. Smyser*, 87 Am. Dec. 304; *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 349; *Governor v. Withers*, 50 Am. Dec. 99, and the extended note to *Campbell v. City of Stillwater*, 50 Am. Rep. 571.

SANDERS v. POTTLITZER BROS. FRUIT COMPANY.

[144 NEW YORK, 209.]

CONTRACT, WHEN PERFECT THOUGH THE PARTIES CONTEMPLATE ITS BEING REDUCED TO A MORE FORMAL WRITING.—If the correspondence and telegrams between the parties contain all the details of a contract it is enforceable though they intended that their agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what already had been agreed upon. Neither party has the right to insist that such agreement should contain terms not stated in the correspondence and telegrams, and if he does so insist and refuses to sign the agreement or perform the contract without such additional terms, he is answerable for the damages sustained by his withdrawal from his contract.

A CONTRACT TO MAKE AND EXECUTE A CERTAIN WRITTEN AGREEMENT, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. Neither party is at liberty to refuse to perform or to enter into the agreement as stipulated.

Eugene M. Bartlett, for the appellants.

George W. Daggett, for the respondent.

210 O'BRIEN, J. The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing:

"BUFFALO, N. Y., Oct. 28, 1891.

"*Messrs. Pottlitzer Bros. Fruit Co., Lafayette, Ind.,*

"GENTLEMEN: We offer you ten carloads of apples to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one-half green fruit, balance red fruit, to be shipped as follows:

"First car between 1st and 15th December, 1891.

"Second car between 15th and 30th December, 1891, and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either way, at the price of \$2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigera-

tor cars, this proposition to be accepted not later ³¹¹ than the 31st inst., and you to pay us \$500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of \$100 per car on the last five cars.

"Yours respectfully,

"J. SANDERS & SON."

To this proposition the defendant replied by telegraph on October 31st as follows:

"LAFAYETTE, IND., 31st October.

"J. SANDERS & SON: We accept your proposition on apples, provided you will change it to read car every eight days from January first, none in December; wire acceptance.

"POTTLITZER BROS. FRUIT CO."

On the same day the plaintiffs replied to this dispatch to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiff's telegram as follows:

"Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract and we will then forward draft. POTTLITZER BROS. FRUIT CO."

The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant:

"LAFAYETTE, IND., November 2, 1891.

"J. Sanders & Son, Stafford, N. Y.,

"GENTS: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and, therefore, we do not think it advisable to take the contract unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract ³¹² so as to read as we wired you we will accept it and forward you draft in payment on same. POTTLITZER FRUIT CO."

On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph:

"November 4th.

"POTTLITZER BROTHERS FRUIT COMPANY, LAFAYETTE, IND.: Letter received. Will accept conditions. If satisfactory, answer and will forward contract. J. SANDERS & SON."

The defendant replied to this message by telegraph, saying: "All right; send contract as stated in our message." The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plaintiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: 1. That the fruit should be well protected from frost and well hayed; 2. That if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; 3. That the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence and I think cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end, and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties ²¹³ contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition, but the defendant's assent to it in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But neither party was entitled to insert in the paper any material condition not referred to in the cor-

respondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition as originally made and the subsequent letters and telegrams, and, if they constituted a contract of themselves, the absence of the formal agreement contemplated was not under the circumstances material. When the parties intend that a mere verbal agreement shall be finally reduced to writing as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed.

But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties by insisting upon the insertion of conditions and provisions not contemplated or embraced in ²¹⁴ the correspondence: *Vassar v. Camp*, 11 N. Y. 441; *Brown v. Norton*, 50 Hun, 248; *Pratt v. Hudson Riv. R. R. Co.*, 21 N. Y. 308. The principle that governs in such cases was clearly stated by Judge Selden in the case last cited in these words: "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is, in all respects, as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met, that a proposition for a contract had been made by one party and accepted by the other, that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract, embodying these terms, should be drawn and executed by the respective parties, this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met through the correspondence upon all the terms as well as the subject matter of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort

to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to reduce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations or of evading the performance ²¹⁵ of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, Who was to bear the expense? The plaintiffs had not agreed to pay it any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiffs sent a plain proposition which the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing without alleging any reasons whatever. The principle, therefore, which is involved in the case is this, Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at a point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if at the close of the correspondence the plaintiffs became

bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think they did, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element ²¹⁶ of great confusion and uncertainty into the law of contracts. If the parties did not become bound in this case they cannot be bound in any case until the writing is executed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except EARL, GRAY, and BARTLETT, JJ., dissenting.

Judgment reversed. —

CONTRACTS—WHEN COMPLETE.—When parties enter into a general contract, and the understanding is that it is to be reduced to writing, or, if it is already in a written form, that it is to be signed before it is acted upon, or to take effect, it is not binding until it is so written or signed: *Mississippi etc. S. S. Co. v. Swift*, 86 Me. 248; 41 Am. St. Rep. 545, and note.

HILES v. FISHER.

[144 NEW YORK, 306.]

TENANCY BY ENTIRETIES CONTINUES TO EXIST IN NEW YORK when a conveyance has been made to a husband and wife, notwithstanding the separate property acts relating to the rights of married women.

TENANCY BY ENTIRETIES.—THE GREAT CHARACTERISTIC which distinguishes a tenancy by entireties from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the consent of the other, can dispose of any part of the estate, so as to affect the right of survivorship of the other.

TENANCY BY ENTIRETIES—POWER AND CONTROL OF HUSBAND.—At the common law a husband was held to be entitled to the full control, and to take all rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage, or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors.

TENANCY BY ENTIRETIES—CONTROL OF HUSBAND.—UNDER THE STATUTES RESPECTING THE SEPARATE PROPERTY OF MARRIED WOMEN by which a husband is deprived of his control over the property of his wife, and of his right to exclude her from its enjoyment, he has no greater interest in, or control over, the property held by him and his wife as ten-

ants by the entirety than she has, and therefore a mortgage made by him and a sale thereunder do not confer upon the purchaser any right to exclude the wife from the property, or from the rents or profits thereof. Such purchaser becomes in effect a tenant in common with the wife, subject to her paramount rights of survivorship.

CASE submitted by agreement to determine the rights of the parties in certain property. The defendants William R. and Maria J. Fisher were husband and wife, and had been for thirty years. During their marriage the property in dispute was conveyed to them, the purchase price being wholly paid by the wife, she consenting that the conveyance be taken in their joint names. Several years afterward the husband borrowed moneys for which he and his wife executed their promissory note. Afterward the husband, to secure this note and some other indebtedness, executed to Goodrich a mortgage on the property, in which the wife refused to join. The mortgagee assigned the mortgage to the plaintiff herein. At a later day the husband executed a conveyance of the property by deed of quitclaim to his wife. Default having been made in the payment of interest on the mortgage, it was foreclosed by statutory foreclosure, and at the sale thereunder was bid in by the plaintiff. The general term adjudged that the plaintiff, by the mortgage and the sale thereunder, had acquired the right of possession to the whole property during the joint lives of the husband and wife, and to the fee in case the husband survived her. The defendants appealed.

A. P. Smith, for the appellant.

S. D. Halliday, for the respondent.

³¹⁰ ANDREWS, C. J. It was decided in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, that the separate property acts relating to the ³¹¹ rights of married women had not abrogated the common-law doctrine, that under a conveyance to husband and wife they take not as tenants in common, nor as joint tenants, but by the entirety, and, upon the death of either, the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife, as survivor, took, upon the death of her husband, the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the

property conveyed to husband and wife during their joint lives, was not considered or decided, but was expressly reserved on the ground that it was not involved in the case then before the court. That question is involved in the present case, and must now be decided.

The decision in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361, is supported by the great weight of authority in other jurisdictions in this country, but in some of the states it has been held that, as a consequence of statutory provisions substantially like those in this state, conferring upon married women the right to take and hold separate property to their own use, free from the control of their husbands as *femes sole*, estates by entireties have been abrogated and turned into tenancies in common. In the states where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits, and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that, notwithstanding the new legislation, a conveyance to husband and wife retains its common-law character and incidents. If the right of the husband to the use, during the joint lives, of lands held under this tenure was a right growing ³¹² out of and incident to this particular species of tenancy; in other words, if it was one of its specific and essential characteristics, then it would be difficult to segregate this right from the other rights incident to and flowing from the tenancy, and to say that while the estate by entireties continues, this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the martial right operating upon property so held, as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint

tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate, so as to affect the right of survivorship in the other: 1 Bl. 182; Washburn on Real Property, 425. Each is said to be seised of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant, or tenant in common with him, seems inconsistent with the doctrine which has finally obtained, that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in *Miner v. Brown*, 133 N. Y. 308, and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common, that estate would be created: See, also, *McDermott v. French*, 15 N. J. Eq. 78; *Wales v. Coffin*, 18 Allen, 213; 1 Washburn on Real Property, 425. There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the ³¹³ governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common: See *In re March*, 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterward: Coke on Littleton, 187 b. It would seem to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important, in view of the subsequent discussion, to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or her interest to the prejudice of the right of survivorship in the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint

lives. They were not regarded as having a joint seisin or a joint possession for the purpose of the use during coverture. The husband was held to be entitled to the full control and to take the rents and profits of the land during the joint lives, to the exclusion of the wife, and he had power to sell, mortgage, or lease, for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors: *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; 32 Am. Dec. 439; *Meeker v. Wright*, 76 N. Y. 262; *Bertles v. Nunan*, 92 N. Y. 152; 44 Am. Rep. 361; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269; *Pray v. Stebbins*, 141 Mass. 219; 55 Am. Rep. 462. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband ^{§14} from the general principle of the common law which vested in the husband *jure uxoris* the rents and profits of his wife's lands during their joint lives: 2 Kent's Commentaries, 130; Stewart on Husband and Wife, sec. 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife, and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits, and control of lands held by him and his wife in entirety, during their joint lives, it is important to regard not only the language, but the spirit of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their

marriage, or which they might thereafter acquire by gift, grant, or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands *jure uxoris*, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resorts to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property.

In determining the question now before us, too much emphasis ³¹⁵ cannot be placed upon the fact that the legislation of 1848 and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife, and the right to exclude her from its enjoyment. If it is still held, notwithstanding this legislation, that the husband takes the whole rents and profits during coverture in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and it deprives the wife, although she has an undoubted interest and estate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives. Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in *McCurdy v. Canning*, 64 Pa. St. 39, or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in *Buttler v. Rosenblath*, 42 N. J. Eq. 651; 59 Am. Rep. 52. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only,

and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right *jure uxoris*, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her, or to her and others jointly, and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

²¹⁶ The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives, and to the fee in case he survived his wife, and by the foreclosure and sale the plaintiff acquired this interest and became a tenant in common with the wife, of the premises, subject to her right of survivorship. The opinion of the general term exhibits, with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives the wife: See 1 Washburn on Real Property, 425; 1 Preston on Estates, 135; *Ames v. Norman*, 4 Sneed, 683; 70 Am. Dec. 269.

The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without costs to either party.

All concur, except HAIGHT, J., not sitting.

Judgment accordingly. —

HUSBAND AND WIFE—ESTATES BY THE ENTIRETIES, WHETHER ABOLISHED BY MARRIED WOMEN'S ACTS.—Tenancy by the entireties is not abolished by a statute abolishing survivorship among joint tenants, nor by legislation which secures to a wife the enjoyment of her separate estate: *Bramberry's Appeal*, 156 Pa. St. 628; 36 Am. St. Rep. 64, and note. See, also the extended note to *Hulett v. Inlow*, 26 Am. Rep. 65.

HUSBAND AND WIFE—ESTATES BY THE ENTIRETIES—POWER OF EITHER TO CONVEY.—Neither a husband nor a wife can mortgage nor convey an estate vested in them as tenants in the entirety, unless both of them join in the instrument, and every instrument by which either attempts alone to make such conveyance is void: *Naylor v. Minock*, 96 Mich. 182; 35 Am. St.

Rep. 595, and note. See further the note to *Phelps v. Simons*, 38 Am. St. Rep. 435.

HUSBAND AND WIFE—ESTATES BY THE ENTIRETIES—POWER OF HUSBAND OVER.—A devise to a husband and wife vests in them an estate by the entireties, which the husband has the right to use during coverture, but cannot alienate: *Phelps v. Simons*, 159 Mass. 415; 38 Am. St. Rep. 430. This question is further discussed in the extended note to *Den v. Hardenbergh*, 18 Am. Dec. 377-388.

CHAS. S. HIGGINS Co. v. HIGGINS SOAP Co.

[144 New York, 462.]

TRADEMARKS—BUSINESS NAME.—Any person may use in his business his family name, provided he uses it honestly, without artifice or deception, although the business he carries on is the same as the business of another person of the same name previously established which had become known to the public by that name, and although it may appear that the repetition of that name in connection with the new business of the same kind may produce confusion and subject the other party to pecuniary injury.

TRADEMARKS—CORPORATION, RIGHT OF TO USE A FAMILY BUSINESS NAME. The fact that the chief stockholders of a corporation are members of the same family does not entitle the corporation with their consent to use the family name as a part of the name of a corporation in such a manner as to interfere with a business previously established and extensively advertised under the same name. Hence, if a business has been established in the name of the Higgins Soap Company, and sold to a corporation bearing that name, a corporation subsequently organized under the same or a very similar name to carry on the same business may be enjoined from using the name, though its principal stockholders are members of the Higgins family.

TRADEMARKS—BUSINESS NAME.—An exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purpose of deception, or even when innocently used without right, to the detriment of another, and this right, which is in the nature of a trademark, may be sold and assigned.

CORPORATION, PROTECTION OF BUSINESS NAME OF.—In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation, which tends to create confusion, and to enable the latter corporation to obtain by reason of the similarity of names the business of the prior one.

H. Aplington, for the appellant.

Jesse Johnson, for the respondent.

465 ANDREWS, C. J. The plaintiff seeks in this action to restrain the use by the defendant in this state of its corpo-

rate name, "Higgins Soap Company," in the business of manufacturing and selling soap, on the ground that such use is an unlawful invasion of the rights of the "Chas. S. Higgins Company," the plaintiff corporation. The corporate names of the respective corporations are not identical, but it is claimed in behalf of the plaintiff that there is a similarity between them which, in connection with other facts, is liable to and has produced confusion, and will enable the defendant to appropriate the trade of the plaintiff. The facts found show that in 1890, prior to the organization of the corporation defendant, under the laws of New Jersey, which took place in 1892, the plaintiff, a domestic corporation, organized by Charles S. Higgins and others, purchased from Charles S. Higgins and his partner, for the sum of eight hundred and ten thousand dollars in stock and bonds, the soap business originally established in Brooklyn by the father of Charles S. Higgins in 1846, to which business Charles S. Higgins succeeded on his father's death in 1860, together with the goodwill, labels, trademarks, and other property employed in the business. The business was very valuable, and the plaintiff and its predecessor expended, subsequent to 1879, in advertising, the sum of three hundred thousand dollars, and the product was extensively sold in New York and other states, and was well known to the trade as "Higgins Soap," and the plaintiff corporation was sometimes known as the "Higgins Soap Company." The plaintiff and its predecessors manufactured a great variety of soaps, which were put up under different names, the leading article being known as "Chas. S. Higgins German Laundry Soap," but, as we infer from the findings, all the soap so manufactured passed under the general name of "Higgins Soap." On the organization of the plaintiff corporation and the purchase of the business it continued to carry it on in ⁴⁶⁶ Brooklyn, where it had been originally established, and where it has ever since been carried on. Charles S. Higgins was a director of the plaintiff and its first president, and so continued for a year after its incorporation, when he was displaced from his position as president and ceased to be a director of the company. The ground of his discharge does not appear. Soon afterward, in the summer of 1892, Charles S. Higgins, with his wife, his son, and two other persons, organized the defendant corporation under the name of the "Higgins Soap Company," to carry on the soap business, and commenced the

manufacture of soap, having its factory, principal office, and place of business outside of New Jersey, in the city of Brooklyn. Charles S. Higgins became the president of the defendant corporation, and among other products it manufactured and put up a soap in bars, on the wrappers of which appear the words "Higgins Soap Company, Original Laundry Soap, Charles S. Higgins, Prest.," and the bars were impressed with substantially the same words.

It was shown on the trial that letters intended for the plaintiff, containing orders for goods, or relating to other business matters, had been sent addressed to the "Higgins Soap Company," "Chas. S. Higgins Soap Co.," and "Chas. Higgins Co.," but in general the plaintiff's place of business was added to the address, and they were received by the plaintiff. There were produced twenty-eight letters and envelopes of this kind, written within four months after the organization of the defendant and the commencement of this action, and it was stated that these did not comprise all the letters of this description.

The main ground upon which the plaintiff has been defeated in the courts below is that Charles S. Higgins or the members of his family, either separately or jointly, had the right to establish the soap business, and to use the name of Higgins in conducting it, and to designate the product as "Higgins Soap," and that no right of the plaintiff was invaded by giving to the corporation formed by them the name of "Higgins Soap Company."

The case of *Meneely v. Meneely*, 62 N. Y. 427, 20 Am. Rep. 489, following ⁴⁶⁷ other cases, is an authority upon the proposition that any person may use in his business his family name, provided he uses it honestly and without artifice or deception, although the business he carries on is the same as the business of another person of the same name previously established, which has become known under that name to the public, and although it may appear that the repetition of that name, in connection with the new business of the same kind, may produce confusion and subject the other party to pecuniary injury. The right of a person to use his family name in his business is regarded as a natural right of which he cannot be deprived, by reason simply of priority of use by another of the same name. In the bill of sale from Charles S. Higgins to the plaintiff the former consented that so long as he should be allowed a salary of fifteen thousand dollars per

year for his services he would give to the company the full benefit of his receipts, processes, etc., and that "so long as he may be employed at the salary aforesaid, he, said Higgins, would refrain from making or selling soap in the city of Brooklyn except for said company," thereby, by implication, reserving the right to engage in the business if the plaintiff should terminate his employment. But the question as to the right of the defendant to assume the name of the "Higgins Soap Company," or to do business in that name, is not affected by any contract entered into between Charles S. Higgins and the plaintiff. The defendant is a distinct person in the law from Charles S. Higgins, one of its corporators and officers. It had entered into no contract with the plaintiff, nor does it derive any of its rights from Charles S. Higgins. It stands, in respect to the question involved in this litigation, in the same situation as if Charles S. Higgins had never been a corporator or stockholder. It cannot appropriate the name, or the trademarks, or the business of the plaintiff by any simulation or deceit, because the law prohibits such appropriation by any person, natural or artificial; but the fact that Charles S. Higgins was active in organizing the defendant, or that he may have been actuated in doing so by feelings hostile to the plaintiff or by a ~~468~~ desire to injure its business, is, as we conceive, irrelevant to the case. The sole test of liability is whether the acts done, either in organizing the defendant or in the prosecution of its business subsequently, invaded any right of the prior corporation or exceeded the boundaries of fair competition. On the other hand, we think it is equally clear that the defendant derives no additional immunity from the fact that the name of "Higgins," in its corporate name, was that of one or more of its corporators, or that Charles S. Higgins, or any one of that name, might engage in the soap business under the family name, or that Charles S. Higgins and the other corporators of the same name had consented to its use. The right of a man to use his own name in his own business the law protects, even when such use is injurious to another who has established a prior business of the same kind and gained a reputation which goes with the name. But in such cases the courts require that the name shall be honestly used, and they permit no artifice or deceit, designed or calculated to mislead the public and palm off the business as that of the person who first established it and gave it its reputation: *Croft v. Day*, 7 Beav. 84; *Holloway v. Holloway*, 18 Beav. 209; *Russia*

Cement Co. v. Le Page, 147 Mass. 206; 9 Am. St. Rep. 685. It is well settled that an exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purposes of deception, or even when innocently used without right to the detriment of another, and this right, which is in the nature of a right to a trademark, may be sold or assigned: *Levy v. Walker*, 10 Ch. Div. 436; *Hoxie v. Chaney*, 143 Mass. 592; 58 Am. Rep. 149; *Bassett v. Percival*, 5 Allen, 345; *Russia Cement Co. v. Le Page*, 147 Mass. 206; 9 Am. St. Rep. 685; *Millington v. Fox*, 3 Mylne & C. 338. In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation which tends to create confusion and to enable the latter corporation to obtain, by reason of the similarity of names, the ⁴⁶⁹ business of the prior one. The courts interfere in these cases, not on the ground that the state may not affix such corporate names as it may elect to the entities it creates, but to prevent fraud, actual or constructive. The names of corporations organized under general laws, and in most other cases, are chosen by the promoters, and it would be an easy way to escape from the obligations which are enforced as between individuals, if a corporation were granted immunity by reason of their corporate character. The principle upon which courts proceed in restraining the simulation of names in the nature of trademarks, and have come to designate the business of a particular person or company, is stated in *Lee v. Haley*, L. R. 5 Ch. App. 155, an action to restrain the use by the defendant of the name of "The Guinea Coal Co.," in his business. "I quite agree (said Gifford, L. J.) that they (plaintiffs) have no property in the name (Guinea Coal Co.), but the principle upon which the cases on the subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." The cases are not infrequent in which the use of corporate names has been restrained on the

principle of the trademark cases: *Holmes v. Holmes etc. Mfg. Co.*, 37 Conn. 278; 9 Am. Rep. 324; *Massam v. Thorley Cattle Food Co.*, L. R. 14 Ch. Div. 748; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94; *Newby v. Oregon Cent. Ry. Co.*, 1 Dedy, 609; *Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. Rep. 495; *Le Page Co. v. Russia Cement Co.*, 51 Fed. Rep. 942.

Whether the court will interfere in a particular case must depend upon circumstances; the identity or similarity of the names; the identity of the business of the respective corporations; how far the name is a true description of the kind⁴⁷⁶ and quality of the articles manufactured or the business carried on; the extent of the confusion which may be created or apprehended, and other circumstances which might justly influence the judgment of the judge in granting or withholding the remedy. Whether, upon equitable principles, the remedy should have been awarded in this case upon the facts proved and found is the question in this case. If the right of the plaintiff to relief depended exclusively upon the comparison of the corporate names of the parties, and the inferences to be drawn from such comparison alone, and without reference to any extrinsic facts, it might well be doubted whether the names are so similar that the court could find that confusion and injury would be likely to arise. But the case does not rest alone upon the inferences from such comparison. It would naturally be inferred from the names that both parties were corporations. The name of "Higgins" appears in each. The name of the plaintiff does not itself indicate the business of the plaintiff corporation, while the name of the defendant describes its business. But while the plaintiff's name does not describe its business, its product has come to be known to the trade as "Higgins Soap," and to the public the name of the product identified the plaintiff as the manufacturer of this product, and the company came to be known and called, to some extent, the "Higgins Soap Company." The use of the name "Higgins" in connection with the business was valuable because of its use for a great number of years by the father of Charles S. Higgins and subsequently by the son, under which a large business had been built up, and by reason of the large sums which had been expended in advertising the product. The name of the plaintiff in connection with these facts indicated to dealers in soap that the article known as "Higgins Soap" was manu-

factured by the plaintiff. The manufacture had been established for fifty years, and carried on in the same place. Among the labels which were transferred to the plaintiff was one containing the words "Higgins Soap," and the word "Higgins" was placed upon many of the labels. It cannot be ⁴⁷¹ doubted upon the findings that the reputation of "Higgins Soap," when the defendant corporation was organized, applied to and designated to the trade the soap manufactured by the plaintiff and its predecessors. The promoters of the defendant, knowing the history of the business established by Higgins, Sr., in 1846, its transfer to the plaintiff, that the product was known to the trade as "Higgins Soap," that the business had become very valuable, and that large sums had been expended in advertising it, proceeded to organize the defendant corporation under the name of the "Higgins Soap Company," and to manufacture soap in the same city where the plaintiff's business was carried on. The inference seems irresistible that the defendant assumed its corporate name so that it should carry the impression that it was the manufacturer of "Higgins Soap," so well known to the public. But if the name was assumed in good faith, and without design to mislead the public and acquire the plaintiff's trade, the defendant, knowing the facts, must be held to the same responsibility as if it acted under the honest impression that no right of the plaintiff was invaded. The names are not identical, but, as said by Bradley, J., in *Celluloid Co. v. Cello-nite Co.*, 32 Fed. Rep. 94: "Similarity, not identity, is the usual recourse where one party seeks to benefit himself by the good name of another." In that case the learned and experienced judge who sat therein expressed the opinion that the use of the corporate name of the defendant should be restrained, although there was a much greater dissimilarity between the names there in question than exists between the names of the parties here. As between these parties the case is, we think, the same as if the word "soap" was written into the plaintiff's name and its corporate designation was "Chas. S. Higgins Soap Company." The evidence shows that confusion has arisen, and it is a reasonable presumption that if the defendant is permitted to continue to carry on the business of soapmaking under its present name the public will be misled and the plaintiff's trade diverted, the extent of such diversion increasing with the increase of the defendant's business.

473 We think the plaintiff, upon the facts found and proved, was entitled to relief by injunction.

The judgment should be reversed and a new trial granted.

All concur, except HAIGHT, J., not sitting.

Judgment reversed.

TRADEMARKS—USE OF ONE'S OWN NAME—TRANSFER OF BUSINESS.— One who transfers a business and the goodwill thereof, including trademarks, a part of which is his name or initials, and at the same time enters into an agreement by which he is to be employed as manager of the business, has no right, on being discharged as such manager, to enter upon business on his own account and use such trademarks therein: *Symonds v. Jones*, 82 Me. 302; 17 Am. St. Rep. 485, and extended note. Generally one using his own name as a trademark cannot deprive another having the same name from using it in conducting his business, provided the latter resorts to no device or artifice to create the impression that the goods manufactured or sold by him are manufactured or sold by the former: *Fraser v. Fraser Lubricator Co.*, 121 Ill. 147; 2 Am. St. Rep. 73, and note; *El Modello Cigar Mfg. Co. v. Gato*, 25 Fla. 886; 23 Am. St. Rep. 537, and note. See, also, the note to *Russia Cement Co. v. Le Page*, 9 Am. St. Rep. 688.

TUBRIDY v. WRIGHT.

[144 NEW YORK, 519.]

MECHANIC'S LIEN.—ON THE DEATH OF THE OWNER OF PROPERTY the right to file a mechanic's lien thereon terminates.

Lawrence E. Prendergast, for the appellant.

William J. Leitch, for the respondents.

520 HAIGHT, J. This action is brought to foreclose a mechanic's lien. It appears that one Samuel O. Wright, in his lifetime, was the owner of seven houses in the course of erection in the city of New York; that he entered into a contract with the plaintiff to do the plumbing therein for the sum of eleven thousand dollars; that the plaintiff entered upon the performance of his contract, and had nearly completed the same when the work was postponed, by the mutual consent of the parties, until further direction by Wright. Shortly thereafter Wright died, leaving a will whereby he devised his property to the defendants in trust. The defendants then called upon the plaintiff to complete his contract, which was done; and thereafter, within the ninety days prescribed by the statute, he filed a lien against the property for the sum of two thousand five hundred and fifty-seven dollars and seventy cents, the amount then remaining unpaid upon his contract.

⁵²¹ The referee found that the value of the work done by the plaintiff, under the direction of the defendants, was the sum of sixty dollars, for which amount he ordered the usual judgment, and refused to include the balance of the plaintiff's claim.

The question presented upon this review is as to whether the plaintiff acquired a valid lien upon the property for the work done under the contract prior to the death of the defendant's testator.

It has been held that, upon the death of the owner of real property, the title passes to his heirs at law or devisees, and that the right to file a mechanic's lien for materials furnished and labor performed terminates with his death: *Crystal v. Flannelly*, 2 E. D. Smith, 583; *Meyers v. Bennett*, 7 Daly, 471; *Brown v. Zeiss*, 9 Daly, 240; *Leavy v. Gardner*, 63 N. Y. 624.

It is contended, however, that these decisions were made under other statutes, and were based upon special language incorporated therein, and that they should not be regarded as decisive of the question now presented.

The statute under which the plaintiff sought to perfect his lien is chapter 342 of the laws of 1885. Section 1 of the act gives to the person performing the work or furnishing material used in the erection of any building, etc., with the consent of the owner, a lien to the extent of the owner's interest therein, not, however, exceeding the amount remaining unpaid upon the contract. Section 4 gives him the right to file his lien at any time during the performance of the work or the furnishing of the materials, or within ninety days after the completion of the contract. Section 5 provides that "the liens provided for in this act shall be preferred as prior liens to any conveyance, judgment, or other claim which was not docketed or recorded at the time of filing the notice of lien prescribed in the fourth section of this act," etc.

The statute under which *Brown v. Zeiss*, 9 Daly, 240, was decided provided that "the liens provided for in this act shall be preferred to any lien, mortgage, or other encumbrance of ⁵²² which the lienholder had no notice, and which was unrecorded at the time of the filing of the claim," etc.

It will be observed that the only material change in the statute is the incorporating therein the word "conveyance," and it is not apparent how this affects the construction of the statute as to the question under consideration. No provision

is found in the statute giving the claimant the right to acquire a lien after the death of the owner.

Mechanics' liens are created by the statute, and whilst the law should receive a liberal construction, so as to secure the beneficial purpose had in view by the legislature, yet, as it creates a remedy unknown to the common law, it may not be extended to cases not fairly within its general scope and purview: *Spruck v. McRoberts*, 139 N. Y. 193; *Stevens v. Ogden*, 130 N. Y. 182; *McCorkle v. Herrman*, 117 N. Y. 296.

It may be claimed that the equities in favor of the lienor are as strong after the decease of the owner as in his lifetime, but the difficulty is, that upon his death the rights of the general creditors intervene, who are entitled to have the entire estate, if necessary, devoted to the payment of their claims.

The judgment appealed from should be affirmed, with costs.

All concur.

Judgment affirmed. —

MECHANIC'S LIEN—PARTIES.—Judgment for the plaintiff in a suit to enforce a mechanic's lien must be reversed for want of the necessary parties defendant, if the only defendant in the suit was the administrator of a deceased owner of the property subject to the lien: *Hughes v. Torgerson*, 96 Ala. 346; 38 Am. St. Rep. 106.

MECHANIC'S LIEN—DEATH OF OWNER BEFORE FILING CLAIM OF.—We may agree with the statement in the principal case that a statute creating and authorizing the enforcement of a mechanic's lien "may not be extended to cases not fairly within its general scope and purview" without at all assenting to the conclusion that the right to such a lien is lost by the death of the owner during the progress of the work, or at any time before the filing of the claim of lien. The general scope and purview of such a statute, in our judgment, extends to the full protection of all persons who as laborers, contractors, or materialmen perform work or furnish materials for the erection of a structure of the class specified in the statute, and there is nothing in any of the statutes to which our attention has been called showing that such protection is, after the death of the owner, any less within the purview or scope of the statute than before. The other New York decisions cited by the court in the principal case, so far as they afford any means of judging the reasons which induced them, appear to be grounded on the assumption that any transfer, whether voluntary or otherwise, during the progress of the work, destroys the right to assert a lien therefor, and yet no provision of the statute is quoted in which such a result appears to be declared. If we look at the provisions of the statute to be found in the decision of the principal case we shall certainly see nothing therein, either expressed or implied, which purports to cut off the right of the lien claimant upon the death of the owner of the property.

The question decided, rather than discussed, in the principal case has not

been either decided or discussed in the other states as frequently as might have been reasonably anticipated. Where it was presented to the superior court of the city of Cincinnati the judge who delivered the opinion said: "The case is not under the ninth section, which provides for unfinished work, but a case where the time of the work being done, and the materials furnished, was during the life of the owner; but the time for taking a lien had not expired, nor had the required steps been taken during the life of the owner. Does his death prevent those steps being taken? It appears to us that, both upon principles of justice and upon the fair construction of the statute, it does not. The lien is expressly given by the first section. The steps required are in the nature of conditions subsequent. In none of those steps is the personal act or participation of the owner required. If the terms of those conditions have been strictly complied with we would be really adding something to the law, to say that a condition that the owner should survive the taking the proper steps to secure the lien is required": *Williams v. Webb*, 2 Disn. 433. In *Pifer v. Ward*, 8 Blackf. 253, it was said: "The question has been raised whether a bill will lie against the heirs of a deceased person to enforce a mechanic's lien which accrued against him in his lifetime? The statute expressly gives a lien to mechanics for work, etc., upon the building constructed or repaired, and authorizes a bill to be brought within one year from the time of the completion of the work to enforce the lien, the proper notice having been given: Rev. Stats. 1883, 412, 413. It is true that a part of the language of the statute, taken literally, seems to contemplate that the bill is to be brought against the 'employer' himself, and there is no express provision for any other defendant. But as the lien attaches to the realty, and the proceedings to enforce it are *in rem*, and as the remedy would be very inadequate if the death of the employer defeated it, we think that the equity of the statute is that the lien survives and binds the property in the hands of the heirs of the employer, and that consequently a bill will lie against them." The question was also considered in *Foster v. Stone*, 20 Pick. 542, but the statute there involved so unquestionably gave the right to enforce the lien after the death of the owner that the decision is not relevant when the statute is silent on this subject.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

BROWN BROS. & Co. v. BILLINGTON.

[163 PENNSYLVANIA STATE, 76]

SALE OR BAILMENT.—A person who receives goods under an agreement by which he is to keep them a certain period, and if he pays for them is to become the owner, but otherwise is to pay for the use of them, receives them as a bailee only, and the property in them is not changed until the price is paid.

SALE OR BAILMENT.—A dealer who receives goods under an agreement to hold them in trust for another as the property of the latter, with liberty to sell on his account, and to hand the proceeds to him to apply on the purchase price, and for the payment of any other indebtedness due from the dealer, takes no property in the goods, and they are not liable for his other debts.

J. G. Johnson and Frank P. Prischard, for the appellants.

Amos Briggs, for the appellee.

78 GREEN, J. In all the cases which have come before us presenting the question which appears on this record we have referred ourselves to the contract of the parties, and upon its interpretation we have adjudged the rights of the parties litigant. If the transaction was a conditional sale, whether in form or in substance, we have held the title in the vendee, and therefore subject to the claims of his creditors, but, if it was a bailment, we have held the title in the bailor, and not subject to any claims of the vendee's creditors. The cases are so numerous that it will be desirable to select only a few of such as are representative in their character.

Thus, in *Myers v. Harvey*, 2 Pen. & W. 478, 23 Am. Dec. 60, which was a case of lease of farming stock to a tenant in possession with compensation for its use, and a sale to the

tenant upon payment of a fixed sum, Gibson, C. J., said: "As it appeared on the evidence ⁷⁹ the case seemed to be that of a bailment, with a superadded agreement to vest the title in the bailee when he should pay a sum certain; and such an agreement is clearly consistent with public policy. No facility to fraudulent dealing is afforded by it that is not afforded in the same degree by a naked contract of bailment. Such a transaction includes two distinct but consistent contracts, the one taking effect, if at all, when the other is spent. The contract of bailment preserves the ownership of the bailor during the particular relation created by it, and the contract of sale, which supersedes it, transfers the title as soon as it is called into action by payment of the price."

This is a distinct declaration of the dual operation of such a contract. The bailment is operative to fulfill its proper function, and it is subverted by the happening of the event which brings about a sale, and both are consistent, and may stand together as part of the same contract relation.

Following this principle the case of *Rowe v. Sharp*, 51 Pa. St. 26, was decided. The ultimate object there was a sale, but a preservation of the title in the grantor with possession in the grantee was desired and accomplished, until, by the payment of the full consideration, the provision for a sale was brought into action. The contract there was a lease of two billiard-tables for nine months, upon payment of definite sums for the use of the tables, and upon the whole amount being paid a bill of sale was to be executed transferring the title. We sustained the contract in both its aspects, and declared it to be a bailment for use of the tables, with provision for sale in case of the payment of the price. This is what was said, Agnew, J: "That a sale of the billiard-tables was contemplated in the lease between Sharp and Goff of the 16th of November, 1865, is manifest in the writing itself, as well as from the other evidence in the cause. But it is the character of the sale which must determine when the title vested. The bill of sale of the 13th of November, 1865, was not signed, and before Sharp, the manufacturer, parted with his possession he had a right to dictate the terms of its transfer. He lived in the city of New York, and the tables were to be taken by Goff into Pennsylvania. The article of lease, as it is called, was the final act of the parties, executed, as its own provisions show, before Sharp had ⁸⁰ parted with his control. By its terms it is clearly a bailment for use (inaccu-

rately termed a lease), with a provision for a sale in case the price of the tables should be fully paid. The possession was delivered to Goff upon the express terms that he was to take the tables to his place of business in Pennsylvania, keep them, and not remove them without Sharp's written consent, and would surrender them at the end of nine months, or sooner, on Goff's failure to pay the installments as they fell due; and a title or bill of sale was only to be made on full payment of the price. The transaction is clearly a bailment of the possession, with an agreement for a future sale conditioned on the payment of the price. According to the authorities this is a valid contract, and can be enforced even against creditors."

Here also the purpose of the parties was to effectuate a sale, in the future, directly to the bailee, who was to have actual possession in the mean time under a different arrangement, and we gave it our sanction as against creditors of the bailee because of the contract. In other words, although the intent of the parties and the effect of their agreement was to vest the title at a future day in the purchaser, he having actual possession in the mean time, yet, as the intervening arrangement was upon a valid contract of bailment as between the parties, the title of the bailor was preserved until terminated by compliance with the provision for a sale, at which time that portion of the agreement became operative.

Clark v. Jack, 7 Watts, 375, is another instance where the same doctrine was applied to a future sale, where the intervening bailment was a permission to use the chattel, a library of books.

In *Rose v. Story*, 1 Pa. St. 190, 44 Am. Dec. 121, we said: "So where one receives goods upon a contract, by which he is to keep them a certain period, and if in that time he pays for them, he is to become the owner, but otherwise he is to pay for the use of them, he receives them as a bailee, and the property in the goods is not changed until the price is paid."

A case still closer to the present is *Becker v. Smith*, 59 Pa. St. 469, the syllabus of which is as follows: Becker, by articles, sold real estate to Linn, and agreed that he should have the use of certain personal property, and might sell materials belonging ⁸¹ to Becker on the premises on commission; Linn to deposit the proceeds with a banker named, and, when the payments to the banker reached a sum named, Linn was to

become the owner of the personal property and materials if any remained; if the sales did not amount to the sum, Linn was to make up the deficiency. Held not to be a conditional sale, but a bailment.

We said, Agnew, J: "Hence the contract provided that the entire stock should be bailed to Linn, to be sold on commission, the new and the old metal to be converted into castings for sale in like manner, and after allowing twenty-five per cent commission for compensation, storage, and sale, the balance to be applied to payment of the judgments. It was only in the event that the four thousand two hundred and fifty dollars should be realized by the sales of stock that the remainder of the stock and other personal property were to become the property of Linn, the other property being delivered to him upon a contract of bailment for use till that event happened. Now, clearly, this was not a mere conditional sale to Linn, but a bailment for legitimate purposes, recognized by repeated decisions as not falling within the principle which subjects personal estate delivered upon a contract of sale, to the execution creditors of the purchaser. . . . In reference to the peculiar features of this contract, to wit, the bailment to sell on commission, and to manufacture and sell, there are two cases directly in point. In *McCullough v. Porter*, 4 Watts & S. 177, 39 Am. Dec. 68, it was held that an agreement to furnish goods to an insolvent to be sold at invoice prices, he returning the invoice price after sale to the consignors, and retaining all above that sum for the support of himself and family, is a bailment, and the goods are not subject to the executions of the insolvent's creditors." The other case referred to is *King v. Humphreys*, 10 Pa. St. 217. Proceeding, Agnew, J., further said: "The delivery of the stock on hand for sale on commission, and of the metal to be converted into castings also to be sold on commission, and the proceeds of the sales deposited with a banker for the purpose of paying off the judgment, was clearly a bailment only; and the property thus bailed was not subject to the executions of Linn's creditors."

We may now pause to consider the character of the contract under which the present contention arises. Sweeting, a dealer in bicycles, applied to Brown Bros. & Co. for letters of credit ⁸² to purchase bicycles abroad. The letters were sent directly to the parties in England, who shipped the goods, got the bills of lading and consular invoices, which

were sent to the London house of the plaintiffs, accompanied by the drafts and invoices, which were drawn at three months. The only witness in the case, Dawson, plaintiffs' manager, testified: "These papers were accepted by our London house, and the goods were shipped to us here as our property, and we delivered them to Mr. Sweeting upon his signing the trust receipt as we call it." The goods were shipped to the plaintiffs, the bills of lading made to them. This, of course, gave them the property in the goods which could only be obtained by the surrender of the bills at the custom-house. The plaintiffs paid the drafts drawn on them for the price of the goods at maturity. Before surrendering the bills of lading to Sweeting he signed the trust receipt in question, containing the following provision: "Received from Brown Brothers & Co. the following goods and merchandise, their property, specified in the bill of lading per Lord Clive, dated Lpool. May 17 '92, marked and numbered thus (marks omitted), and in consideration thereof { $\frac{1}{w.}$ } hereby agree to hold said goods in trust for them, and as their property, with liberty to sell the same for their account, and further agree, in case of sale, to hand the proceeds to them to apply against the acceptances of Brown, Shipley & Co., on { $\frac{m}{o.}$ } account under the terms of letter of credit No. 784 issued for { $\frac{m}{o.}$ } account to Brown, Shipley & Co., or Brown Bros. & Co. Brown Bros. & Co. may at any time cancel this trust and take possession of said goods, or of the proceeds of such of the same as may then have been sold, wherever the said goods or proceeds may then be found; and in the event of any suspension or failure or assignment for benefit of creditors on { $\frac{m}{o.}$ } part, or of the nonfulfillment of any obligation, or of the non-payment at maturity of any acceptance made by { $\frac{m}{o.}$ } under said credit, or under any other credit issued by Brown Bros. & Co., or Brown, Shipley & Co., on { $\frac{m}{o.}$ } account, or of any indebtedness on { $\frac{m}{o.}$ } part to either of them, all obligations, acceptances, indebtedness, and liabilities whatsoever shall thereupon, with or without notice, mature and become due and payable. The said goods while in { $\frac{m}{o.}$ } hands shall be fully insured against loss by fire."

It will be observed that this was not in any event an undertaking on the part of Brown Bros. & Co. to sell the bicycles to Sweeting. He was not to become the owner of them by purchase or in any other way. In this respect the case is far stronger than any of the reported cases in favor of the

grantor or bailor. It must also be remembered that Sweeting had no title to the goods, and no possession, except as derived through and by operation of the trust receipt. He paid nothing for them; he had no right or title to them prior to the trust receipt, and that paper was the only source of any right to the possession or control of them for any purpose whatever. What, then, was his right under the receipt? Only this: He was to hold the goods in trust for Brown Bros. & Co. as their property, with liberty to sell them for their account, and pay over to them the proceeds, to be applied to the payment of acceptances given for the price of the bicycles, and was entitled to credit upon any other indebtedness of his to either of the plaintiffs' firms.

In what conceivable aspect of this contract was Sweeting to become the owner of the goods? Plainly none. His duty was to sell the goods for the account of the plaintiffs, and while he was selling them he was holding them in trust for the plaintiffs. Even his possession was not on his own account, but on theirs. The service he was to render was not for himself but for them. Even the proceeds of the sales he made did not belong to him but to them. At the very utmost the contract was but a bailment for sale without any title or ownership of any kind in the bailee in any event. The case is too plain for extended argument. Not a case has been referred to us in which an ownership was held to arise in the bailee upon such a state of facts as this. On the contrary, in the following cases, the principles and authorities heretofore cited are recognized, affirmed, and applied, and in all of them, although an interest as owner was to be acquired by the bailee for use or sale, or lessee, or other party ultimately interested, the right of the bailor, lessor, or vendor, was sustained against the creditors of the other party: *Enlow v. Klein*, 79 Pa. St. 488; *Henry v. Patterson*, 57 Pa. St. 346; *Edwards' Appeal*, 105 Pa. St. 103; *Ditman v. Cottrell*, 125 Pa. St. 606. See *Monjo v. French*, 163 Pa. St. 107.

Judgment reversed, and new venire awarded.

SALE OR BAILMENT.—As to when certain transactions are to be considered sales and when bailments, see the following line of cases: *Mack v. Snell*, 140 N. Y. 193; 37 Am. St. Rep. 534, and note; *Chickering v. Bantress*, 130 Ill. 206; 17 Am. St. Rep. 309, and note; *Barnes v. McCrea*, 75 Iowa, 267; 9 Am. St. Rep. 473, and note; *Wheeler etc. Mfg. Co. v. Heil*, 115 Pa. St. 487; 2 Am. St. Rep. 575; *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706, and extended note; *Reherd v. Clem*, 86 Va. 374.

SWARTZ v. MORGAN.

[163 PENNSYLVANIA STATE, 196.]

ATTORNEY AT LAW—AUTHORITY TO GIVE INDEMNITY.—An attorney employed to bring suit has authority to take all steps necessary in the regular course of the litigation, and may give a bond of indemnity in his client's name.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT TO EMPLOY ATTORNEY.—A general agent, with authority to make collections of cash and notes for his principal, has power to direct an attorney at law to bring suit, and to give a bond of indemnity in the name of such principal.

JUDGMENTS—OPENING AND SETTING ASIDE—APPEARANCE.—A judgment regular on its face, without evidence of defense to it on the merits, cannot be opened or set aside on the ground that the appearance for the defendants was unauthorized, if that fact is not admitted or proved.

E. W. Biddle and J. W. Wetzel, for the appellant.

199 MITCHELL, J. The petition of the defendants to have the judgment struck off as to them avers that they had no knowledge of the suit, and the appearance of Swartz for them was unauthorized; that they had a good defense, based on the fact that they did not execute the bond on which judgment was obtained. The testimony of defendants' secretary, taken on the rule, shows that these are meant to be technical averments, and are only true in the letter.

An attorney employed to bring suit has authority to take all the steps necessary in the regular course of litigation. Thus it has been held that he may enter an amicable action: *Cook v. Gilbert*, 8 Serg. & R. 567; he may agree to the reinstatement of an action against his client after it has been nonsuited: *Reinholdt v. Alberti*, 1 Binn. 469; and he may refer it to arbitrators with an agreement that their award shall be final: *Wilson v. Young*, 9 Pa. St. 101. In the last case it was said that "in Pennsylvania the authority of an attorney is more extensive than in other countries; and indeed it would be difficult to point out any matter or thing in the legitimate conduct of a suit to judgment which he may not do." And if he assumes expense or liability for his client, he is entitled to be made whole by any regular means. Thus in *McDaniels v. Cutler*, 3 Brewst. 57, an attorney having issued an execution was met by a claim of a third party on the goods, and thereupon, without any express authority from his client, indemnified the sheriff and the execution proceeded. Being then sued for trespass, he sent a demand to his client for indemnity, to which no reply was made, and

a bill being subsequently filed by the client against him for an account, this court held that he was entitled to be reimbursed his expenses in defending the trespass.

In the present case Mr. Stuart having obtained a judgment in favor of Morgan & Co. against Neidig, and issued execution thereon, was asked by the constable for indemnity. It has been held that an attorney for a nonresident client has implied authority to give such a bond in his client's name: *Clark v. Randall*, 9 Wis. 135; 76 Am. Dec. 252; *Schoregge v. Gordon*, 29 Minn. 367. It is not necessary for us to go so far, or to consider the point, as Stuart was expressly authorized by Correll to give the indemnity ²⁰⁰ on behalf of Morgan & Co. This raises the chief question in the case, the authority of Correll to act for Morgan & Co. in the matter. The depositions show that he called himself "general agent," with their authority, for they furnished him billheads in which he is so described. His apparent authority therefore extended to the management of all their business within the district to which he was assigned. But without entering upon that question he had authority in fact to make collections both of cash and of notes, from the local agents, and from purchasers of machines. The only restrictions the secretary of Morgan & Co. mentions are that Correll's collections were to be sent as fast as made to the home office, and he was not to keep a bank account with Morgan & Co.'s money. All the notes, the secretary says, were made in the name of Morgan & Co. In collecting them Correll necessarily had to use Morgan & Co.'s name, and had their authority to take all necessary and usual steps for the purpose. In retaining Mr. Stuart, therefore, to collect the claim against Neidig, Correll was within his actual authority, and it extended to directing him to give an indemnity bond to the constable in furtherance of the execution, on which Morgan & Co. should be liable. Being given by direction of their agent with their authority in fact, Morgan & Co. were as much bound by it as if they had executed it themselves. Whether they knew it was given or not was immaterial. They knew that Neidig's account was in arrear and unpaid, and afterward that it had been paid, that their agent was attending to the collection, and that he sent them the money after deducting the fees of Mr. Stuart and Mr. Chamberlain for collection. If they did not choose to inquire what the deductions were for, or by

what steps their agent had finally got the money, their ignorance was their own fault.

There being therefore no defense shown on the merits, to the liability of defendants on the indemnity bond, we have further to consider whether there was any irregularity in the mode of entering the judgment. Correll had notice of the suit, and his reply to Stuart, "Morgan & Co. are square people, and we will take care of you," shows that he knew the ultimate liability of his principals to save the bondsmen harmless, and acquiesced in what Stuart was doing in the action. Stuart of course had the right to appear for himself and his cosurety, and the notice ²⁰¹ to Correll, and his conduct on receiving it are convincing evidence of his consent to Stuart's acting for Morgan & Co. also. That Stuart, for professional reasons, entirely proper, preferred to have the appearance, in a case to which he was a party, entered in the name of another attorney, is of no importance at all. There was no delegation by him of discretion or of authority; he conducted the case himself, and that he did so in the name of Mr. Swartz was a difference of form, not of substance.

There was no sufficient ground for opening the judgment. It was regular on its face, and the evidence shows no defense to it on the merits.

Order opening judgment reversed and rule discharged.

ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY TO GIVE INDEMNITY. A bond of indemnity under seal, executed by an attorney whose authority was by parol, is valid against his client as a simple contract without regard to the seal: *Ford v. Williams*, 13 N. Y. 577; 67 Am. Dec. 83. Attorneys at law who are employed to collect debts for nonresident clients, have authority to employ all the necessary and usual means for the accomplishment of this object. They have implied authority to indemnify an officer making a levy: *Clark v. Randall*, 9 Wis. 135; 76 Am. Dec. 252, and note. See the extended note to *Kirk's Appeal*, 30 Am. Rep. 358.

AGENCY—AUTHORITY OF AN AGENT GENERALLY.—Authority to an agent to do an act includes the power to do every thing necessary and requisite to its performance: *Piercy v. Hedrick*, 2 W. Va. 458; 98 Am. Dec. 774, and note; *Benjamin v. Benjamin*, 15 Conn. 347; 39 Am. Dec. 384, and note. See further the extended note to *Huntley v. Mathias*, 47 Am. Rep. 518.

JUDGMENTS ON UNAUTHORIZED APPEARANCE OF ATTORNEY—RELIEF FROM.—In order to enable a party represented by an unauthorized attorney to be relieved, he must negative the presumption of authority in the attorney to appear: *Harshey v. Blackmarr*, 20 Iowa, 161; 89 Am. Dec. 520, and note. When the court acquires jurisdiction of an action solely by the appearance

of an attorney the party for whom the appearance was made may deny the authority of such attorney, and, if the appearance was unauthorized, vacate the judgment: *Winters v. Means*, 25 Neb. 241; 13 Am. St. Rep. 489, and note. See *Corbitt v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586, and note; and also the extended note to *Bunton v. Lyford*, 75 Am. Dec. 146.

FIDELITY MUTUAL LIFE ASSOCIATION v. JACKSON.

[163 PENNSYLVANIA STATE, 208.]

MECHANICS' LIENS—CONTRACT NOT TO FILE.—A building contract under which the contractor agrees to keep the lot and building free from mechanics' liens, and any and all manner of charges, precludes the principal contractor, subcontractor, or any other person from filing and foreclosing any lien or charge against the building.

J. W. Eckels, for the appellant.

J. W. Wetzel, for the appellee.

208 GREEN, J. This is an appeal from the decree of the court below making distribution of the proceeds of the sale of the real estate of Newton Jackson. The question at issue is as to the right to file liens of certain mechanic's lien creditors, who furnished work and materials to one James Porter, who was the principal 209 contractor, for the erection of certain buildings on the premises sold by the sheriff. The contract between the owner and the principal contractor was an ordinary building contract, and contained the following provisions: "The party of the second part agrees that he will keep the lot and building free from mechanics' liens and any and all manner of charges." The auditor and court below held that this language precluded the principal contractor from filing any lien, and his lien was rejected from the distribution. But they also held that there was nothing to prevent subcontractors from filing liens, because it might be reasonably concluded that the parties meant by the foregoing language that if subcontractors should file liens, the principal contractor should remove them, and therefore that the case was brought within the ruling, in *Nice v. Walker*, 153 Pa. St. 123, 34 Am. St. Rep. 688, and *Cresswell Iron Works v. O'Brien*, 156 Pa. St. 172, 36 Am. St. Rep. 30. We cannot agree to this conclusion. The language of the clause in question, as we understand it, is absolute, and means just what it says, that the contractor shall "keep the lot and building free from

mechanics' liens, and any and all manner of charges." That is, the lot and building shall be free at all times from mechanics' liens and any kind of charges. The lot and building would not be kept free from such encumbrances if they could be imposed at any time. They are to be kept free, and that condition could not be maintained if the liens were allowed to be filed and maintained during a continuous period and only released at the completion of the building, or some other indefinite time. If they are to be kept free they must by necessity be free all the time. It is very plain, therefore, that the words of the clause in question are the full equivalent of a contract not to file, or permit to be filed, by any person, any lien or charge whatever. This brings the case directly within *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, *Benedict v. Hood*, 134 Pa. St. 289, 19 Am. St. Rep. 698, and other kindred cases; and especially *Ballman v. Heron*, 160 Pa. St. 377, and it is entirely consistent with every thing contained in *Nice v. Walker*, 153 Pa. St. 123, 34 Am. St. Rep. 688.

The cases of *Evans v. Grogan*, 153 Pa. St. 121, *Murphy v. Ellis*, 153 Pa. St. 133, *Cresswell Iron Works v. O'Brien*, 156 Pa. St. 172, 36 Am. St. Rep. 30, and *Lucas v. O'Brien*, 159 Pa. St. 535, are all cases in which the provisions of the contract were consistent with a privilege on the part of a subcontractor to file a lien, and contained ²¹⁰ nothing exclusive of such a right. They are therefore inapplicable to the present case, where the express words of the contract are in entire hostility to any such right. It follows that the claims of the mechanics' lien creditors in this case must be postponed to that of the appellant.

The decree of the court below is reversed, and the record is remitted with instructions to distribute the fund in accordance with this opinion at the cost of the appellees.

MECHANICS' LIENS—AGREEMENTS NOT TO FILE.—If a contractor covenants with an owner not to file a lien nor to permit one to be filed by others, neither he nor any subcontractor under him is entitled to a lien: *Nice v. Walker*, 153 Pa. St. 123; 34 Am. St. Rep. 688; *Taylor v. Murphy*, 148 Pa. St. 337; 23 Am. St. Rep. 825, and note.

BOLLINGER v. GALLAGHER.

[163 PENNSYLVANIA STATE, 245.]

HUSBAND AND WIFE—MARRIED WOMAN'S NOTE—RIGHTS OF HUSBAND'S CREDITORS.—A statute authorizing married women to acquire property by purchase free from their husbands' debts and to give notes therefor, but only when their husbands join in their execution, cannot be construed, as matter of law, as clothing the husband with the title to property purchased solely on the credit of the wife, so as to render it liable for his sole debts, when the purchase price of the property is secured by a note signed by the wife, her husband and her sureties, and paid by the wife and her sureties alone.

LAWS OF ANOTHER STATE—PROOF OF CONSTRUCTION OF.—The construction of a statute of another state may be shown by the testimony of a lawyer practicing therein.

LAWS OF ANOTHER STATE—PROOF OF CONSTRUCTION.—The construction of a statute of another state by the courts of that state may be shown either by one familiar with or by the published reports of the decisions made by such courts or both methods may be used in the same case.

TRESPASS for a wrongful levy upon personal property. Upon the trial, and after the court had admitted the statutes of another state in evidence to show what was the written law of that state in regard to the rights and capacities of married women, the plaintiff offered as a witness a practicing lawyer of that state, and proposed to prove by him the construction placed upon such statutes by the courts of that state. This offer was rejected by the court as incompetent. Judgment for the defendants, and plaintiff appealed.

H. C. Niles, W. F. B. Stewart, and G. E. Neff, for the appellant.

H. L. Fisher, G. G. Fisher, C. E. Ehrehart, and O. L. Quinlan, for the appellees.

249 WILLIAMS, J. This case was in this court in 1891, and may be found reported in 144 Pa. St. 205. The principal questions then raised **250** were: .1. Whether the attachment proceedings begun by Johns, before P. S. Bowman, Esq., against George Bollinger, were sufficient to support a seizure and sale of Bollinger's goods; 2. Whether, if they were sufficient as against the defendant therein, the plaintiff, who was the wife of George Bollinger, was bound to show a title in herself good against her husband's creditors to entitle her to recover; and 3. Whether in the absence of proof to the contrary the laws of a sister state were to be presumed to be the same as

our own, upon any question material to the rights of the parties.

Upon these questions the judgment appealed from was reversed, and a new venire awarded. A new trial has now been had. The plaintiff submitted to the jury the facts upon which she claimed title to the goods sold, and, under the instructions of the learned judge of the court below, these facts have been found insufficient to vest in her a title good against her husband's creditors. The important questions now raised are over the correctness of the instructions complained of, and are presented by the eighth and ninth assignments of error.

It appears that by the statutes of Maryland a married woman may acquire property by purchase, and, when so acquired, it is not liable for her husband's debts. She is authorized to give notes, but only when her husband joins in their execution. She may be sued jointly with her husband on such notes, and the judgments obtained against them "shall be liens on the property of the defendants, and may be collected by execution or attachment in the same manner as if the defendants were not husband and wife." In 1886 and part of 1887 Bollinger and wife lived in Maryland. In October, 1887, the personal property of George Bollinger was sold by the sheriff of Carroll county. Eliza Jane Bollinger became a purchaser of property at this sale, amounting to seven hundred and forty-seven dollars and forty-five cents, under an arrangement that she was to pay for the same by giving her note, executed in accordance with the laws of Maryland, by herself and her husband, with Thomas J. Gorsuch and Jacob Bollinger as sureties. The husband was insolvent at the time, but his wife could execute a note that would bind her own property, only by his joining her in its execution. The sureties agreed with Mrs. Bollinger and the payee of the note that if she was not able to pay the note at its maturity they would pay it for her and take a bill of sale of the ²⁵¹ property. When the note fell due she was able to pay but a small part of the money, and Mr. Gorsuch lent her the balance necessary to pay the note, and took a bill of sale as his security. This property, or portions of it, so bought and paid for, was levied on in Pennsylvania, by Gallagher at the suit of Johns, as the property of George Bollinger, and sold. Mrs. Bollinger gave notice of her claim,

which was disregarded, and, after the sale, brought this suit to recover the value of the property.

The plaintiff's first point asked the court to charge: "If the jury believe from the evidence that the goods were sold to the plaintiff not upon her husband's credit, but solely on the faith the vendors and those who became her sureties had in her integrity and ability to pay the debt, she was entitled to hold them against her husband's creditors." The learned judge replied: "This question does not properly arise on the evidence in this case because the plaintiffs have shown affirmatively that the husband's credit, or at least his legal responsibility, did enter as an element into her purchase of this property." By the plaintiff's second point the court was asked to say that under the law of Maryland a married woman had the same right to acquire and hold property as if she was sole. This was answered in the same manner as the first point by saying that the point was not applicable to the case trying, for the reason "that the husband's credit or legal responsibility entered into her purchase." If these answers give a correct exposition of the effect of sections 19 and 20 of the revised code of Maryland as adopted in 1878, then a married woman is no better off than she was before these sections were adopted. If she can give a note that shall bind her in but one way, and that way is by having her husband join her in its execution, then it follows from these answers that her note so given for goods purchased and actually paid for by her and her friends at its maturity does not give her any title to the goods so bought and paid for, but vests the title in her husband. This result is reached not because the husband bought the goods, nor because he paid for them, or any part of them, but because his "legal responsibility entered into the purchase." That is to say, because the statute required him to join his wife in order to make her note binding on her in her own business, the fact that he did so made the business his own and clothed him with the title to the property she purchased with the note.

252 We do not think this construction of the statutory provisions referred to has been adopted by the courts of Maryland, or ought to be adopted on principle. It does not serve to uphold but to nullify the law. It converts provisions evidently intended to enlarge the powers of a married woman, and enable her to make purchase of property on her own account, into a conduit to transfer to her husband and

her husband's creditors the property so purchased by her. In this case that result is reached notwithstanding the fact that the note was actually paid by the wife and her friends without the contribution of a single dollar by the husband. The error of the learned judge was in treating the question of ownership as one of law for his determination instead of treating it as one of fact for the jury to consider and decide.

If the joinder of the husband in the note was necessary under the law of that state to enable his wife to make a valid note capable of enforcement against her, and if the purchase was in fact made by her with this note on her own credit and the credit of her sureties, and its payment was by her and her sureties without aid from her husband, then the jury would have been warranted in finding that the property purchased with it belonged to her, and that she was entitled to recover its value in this action. The joinder of the husband required explanation. It was explained by the Maryland statute which made it necessary to enable his wife to bind herself by her note. The question of ownership was thereafter not a question of law, but a question of fact to be determined from all the circumstances connected with the transaction as they were presented by the evidence. The eighth and ninth assignments of error are sustained.

We think the third assignment must also be sustained. The construction of the statute of another state, by the courts of that state, may be shown either by one familiar with or by the published reports of the decisions made by such courts, or both methods may be used in the same case. The testimony of an expert may or may not be helpful, depending to some extent upon whether the precise question has arisen in some reported case and been finally passed upon; but the testimony offered was certainly competent, and it was error to reject it.

The rejection of the testimony referred to in the first and ²⁵² second assignments of error was logical and consistent with the general view of the case entertained by the learned judge. If the manner of the execution of the note was conclusive upon the question of ownership, then the circumstances were unimportant. But treating the case as depending on its facts, then so much of the evidence offered as might be necessary to show for whom the sureties agreed to become liable, and that it was upon the credit of Mrs. Bollinger and the business upon which she proposed to enter

with the aid of the property bought by her that their undertaking was made, was competent and relevant. To this extent the first and second assignments of error are sustained.

The judgment is reversed and a venire *facias de novo* awarded.

HUSBAND AND WIFE—LIABILITY OF WIFE'S SEPARATE PROPERTY FOR HUSBAND'S DEBTS.—A wife's separate property is not liable for her husband's debts: *Evans v. Welborn*, 74 Tex. 530; 15 Am. St. Rep. 858, and note; *Botts v. Gooch*, 97 Mo. 88; 10 Am. St. Rep. 286, and note. And the fact that the husband has had the management of the wife's separate estate will not affect her title to it so far as his creditors are concerned: *Second Nat. Bank v. Merrill*, 81 Wis. 151; 29 Am. St. Rep. 877. The separate property of the wife becomes subject to the debts of the husband only when he is permitted to deal with and obtain credit upon it as if it were his own with her full knowledge and consent: *De Votie v. McGerr*, 15 Col. 467; 22 Am. St. Rep. 426, and note.

FOREIGN LAWS—PROOF OF.—The laws of a foreign country are to be proved by evidence, and the court is to decide what is the proper evidence of such laws: *De Sobry v. De Laistre*, 2 Har. & J. 191; 3 Am. Dec. 535. A foreign law if written must be produced in evidence; if unwritten it must be proved by the testimony of disinterested and intelligent witnesses: *Woodbridge v. Austin*, 2 Tyler, 364; 4 Am. Dec. 740; *Dougherty v. Snyder*, 15 Serg. & R. 84; 16 Am. Dec. 520; *Phillips v. Gregg*, 10 Watts, 158; 36 Am. Dec. 158; *Baltimore etc. R. R. Co. v. Glenn*, 28 Md. 287; 92 Am. Dec. 688.

REESE v. HERSHEY.

[168 PENNSYLVANIA STATE, 258.]

MASTER AND SERVANT—NEGLIGENCE—MACHINERY.—In an action by an employee against his master to recover for personal injury, the test of liability is not danger, but negligence, which can never be imputed from the employment of methods or machinery in general use in the business.

MASTER AND SERVANT—NEGLIGENCE—EVIDENCE.—In an action by an employee against his master to recover for personal injury caused by the temporary removal of a safety guard of machinery, evidence is admissible to show that the same kind of machinery was used without guards in other factories where the employee had previously been employed, and that the guard in question was not in general use in the business.

MASTER AND SERVANT—NEGLIGENCE—MACHINERY.—The use of machinery without a guard being the ordinary custom of the trade is not *prima facie* negligence on the part of the master in case of injury to the servant, and can only become negligence if the servant's inexperience is such that he ought to have been given special instructions concerning its use, and such instructions were not given.

MASTER AND SERVANT—NEGLIGENCE—MEASURE OF DAMAGES—EARNINGS.

In an action by a father to recover for personal injury to his minor son caused by negligence it is error to charge the jury, without evidence, that such son was likely to earn more than his present wages in the near future "by way of promotion."

TRESPASS by a father to recover damages for personal injury to his son. Such son, seventeen years of age, was injured while working at a candy rolling machine in defendant's factory. Such machine was fitted with a safety guard invented by the defendant, but such guard was not in general use in other similar factories. The defendant, after working the machine the day of the accident, took off the guard about 7 o'clock, and directed the boy to go on with the work; this he did, and worked about four hours before he was injured. Judgment for the plaintiff, and defendant appealed.

H. M. North and E. D. North, for the appellant.

B. F. Eshleman and G. Nauman, for the appellee.

287 **MITCHELL, J.** The evidence of the general use of the machines throughout the trade, without guards (assignments 10 to 16 inclusive), should have been admitted. In all actions for negligence it is important that the jury should be informed explicitly just what the negligence consists in. The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence. Moreover, the use of a dangerous machine is very commonly considered ground for holding the employer responsible, whereas the test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944; *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633. It is true that the general custom would not be conclusive of this case, under its peculiar circumstances to be noticed next, but it was the starting point in the defense, and the defendant was entitled to show it affirmatively so as to impress it on the jury's mind. Moreover, the evidence offered in the fifteenth assignment of error, to show that the same kind of machines were used without guards in another factory where plaintiff's son had previously worked, bore directly on the only point in the case on which the defendant's negligence could be rested. This was that if plaintiff's son had only been accustomed to the machine with the guard, and might be liable from force of habit, or

ignorance of the increased danger when the guard was removed, to push his fingers too close to the rolls and thereby get them caught, he would have been entitled to special ²⁵⁸ instruction as to this danger. As to what conversation or orders took place between the boy and his employer on this point the evidence was conflicting. The case therefore could not have been taken from the jury, but the defendant was entitled to have explicit directions that the use of the machine without a guard being the ordinary habit of the trade was not negligence *prima facie*, and would only become so if the boy's inexperience was such that he ought to have had special instructions when the change was made. The learned judge not only failed to give the defendant the benefit of the general rule in his charge, but excluded the evidence which would have put the facts before the jury.

There was error also in the charge as to damages. The boy was earning two dollars and a half a week. If it was claimed that he was likely to earn more in the near future the plaintiff should have proved the fact as part of his case, but the learned judge, without any evidence on the subject, threw in a suggestion that the boy might get more "by way of promotion." The verdict was in favor of the father for more than double the boy's gross wages until he should reach twenty-one. We cannot say that this suggestion as to promotion may not have contributed to this result.

The learned judge appears in the opening of his charge to have read the plaintiff's statement to the jury, including the averment of damages. This is exceedingly bad practice. It tends to get figures and amounts into the jury's mind without evidence. Here again the verdict is suggestive, for it is for one thousand dollars, the exact amount of the technical *ad damnum* clause in the statement.

Judgment reversed and *venire de novo* awarded.

MASTER AND SERVANT.—THE TEST OF THE LIABILITY OF A MASTER to his servant is negligence, not danger: *Kehler v. Schoenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note, with the cases collected.

MASTER AND SERVANT—MACHINERY IN GENERAL USE.—The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business: *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 618; 20 Am. St. Rep. 944, and note. When the machinery furnished by a master for the use of his servant is of the kind in common use for the same purpose the master is justified in using it, and will not be liable for an injury caused thereby unless he has information or reason to believe that its use is attended

with danger, or that a safer kind of machinery is in common use for the same work: *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473; 27 Am. St. Rep. 897, and note. An employer is bound to furnish machinery and appliances of ordinary character and reasonable safety, and the former is the conclusive test of the latter: *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633, and note. See the notes to *Monmouth Min. etc. Co. v. Erling*, 39 Am. St. Rep. 193; *Lehigh etc. Coal Co. v. Hayes*, 15 Am. St. Rep. 682; and the extended notes to *Kelley v. Silver Spring Co.*, 34 Am. Rep. 621, and *Bumell v. Laconia Mfg. Co.*, 77 Am. Dec. 218.

LIEDERKRANZ SINGING SOCIETY v. GERMANIA TURN VEREIN.

[168 PENNSYLVANIA STATE, 265.]

UNINCORPORATED ASSOCIATIONS—ACTIONS BY PARTIES.—In cases of unincorporated associations whose membership is large, suits may be brought by some of the members in their own names on behalf of, or as representing all, or in the name of the association by certain of its members. The former form is preferred.

UNINCORPORATED ASSOCIATIONS—PROPERTY RIGHTS, HOW DECIDED.—A contention between the members of an unincorporated association as to the present right of possession of its property must be decided by the constitution and by-laws of the association, or, in the absence of any sufficient provision therein, by the majority of the members. The right of possession in such case is generally joint and not several.

REPLEVIN to recover furniture and other personal property. The Liederkranz Singing Society was composed of about twelve active, and two hundred passive, members. At a meeting of the active members of the society it was resolved by the majority to remove the headquarters of the society to the hall of the Germania Turn Verein. The president, vice-president, and one trustee of the former society thereupon moved its property to the new quarters. The members of the society who were in opposition then brought this suit under the name of the *Liederkranz Singing Society of Lancaster, Pa.*, by *F. C. Ostermayer et al.* of the Board of Trustees of said Society v. *Germania Turn Verein of Lancaster, Pa.*, and the afore-said officers of the former society. The trial court entered a nonsuit on the motion of the defendants, on the grounds that the complainants had established no legal party plaintiff and had shown no right to maintain the suit, and that the defendants were entitled to the possession of the property in suit. The complainants appealed.

B. F. Davis, for the appellants.

J. A. Coyle, W. U. Hensel, J. H. Brown, and W. R. Brinton, for the appellee.

268 MITCHELL, J. It is conceded that in cases of unincorporated associations whose membership is large, suits may be brought by some of the members in their own names on behalf of or as representing all. The present action, therefore, would have been sustainable if brought in the name of Ostermayer and others in behalf of the members constituting the Liederkrantz Society. It was brought in the name of the Liederkrantz Society by Ostermayer *et al.* There is no substantial difference. The allowance of suits in any such form is a modification of the ordinary requirements as to parties, introduced by equity in the interest of practical convenience. "The second class is where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole. In cases of this sort the persons interested are commonly numerous, and any attempt to unite them all in the suit would be even, if practicable, exceedingly inconvenient": Story's Equity Pleading, sec. 107. It is necessary that the suit should be brought on behalf of all the parties in interest, but this may as well be done in substance by using the general name which describes them all, as by the phrase "in behalf of themselves and all others interested." The latter is the usual form, and it is always better to adhere to established practice, but, there being no plea in abatement here, the common interest of the parties being substantially expressed on the record, and there being individual plaintiffs responsible for costs, the case was not in position to be nonsuited for want of parties.

Unincorporated societies have long held in this state an intermediate position between corporations and partnerships. 269 Those for religious purposes, it is said by Lowrie, J., in *Phipps v. Jones*, 20 Pa. St. 260, 59 Am. Dec. 708, "have always, and especially since the act of 1731, been recognized as having an associate and *quasi* corporate existence in law." Their ownership of property is of the same intermediate character. It partakes of the qualities of both the others, the title being for many purposes joint and several like that of partners or joint tenants, while the right of possession is joint only as in corporations. Where the question of the

right of present possession arises it must be decided by the constitution and by-laws of the association, or, in the absence of any sufficient provision therein for such a case, by the majority. That is the real issue here. The plaintiffs claim the right to represent the association in the possession of the property sued for. If they can establish it they will be entitled to the verdict; if not, they must fail.

Judgment reversed and *procedendo* awarded.

UNINCORPORATED ASSOCIATIONS—ACTIONS.—PARTIES: See the extended note to *Phipps v. Jones*, 59 Am. Dec. 711-718.

UNINCORPORATED ASSOCIATIONS—PROPERTY RIGHTS.—HOW DECIDED: See the extended notes to *Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 168, and *Connelly v. Masonic Writ. Ben. Assn.*, 18 Am. St. Rep. 301.

MAGUIRE v. HERATY.

[163 PENNSYLVANIA STATE, 331.]

SPECIFIC PERFORMANCE—SALE TO TWO VENDEES.—If an owner of land enters into an oral contract to sell it, and subsequently executes a written agreement to sell the same land to another party, the latter is not entitled to specific performance of his contract in order to prevent the vendor from executing and carrying out the first contract.

SPECIFIC PERFORMANCE—PARTIES.—After an owner of land has ignored his written agreement to convey the land, by conveying to another under a prior oral contract, the purchaser who has paid the purchase money and directed the deed to be made to a third person is a necessary party to a bill for specific performance filed by the holder of the written agreement against the vendor and against the grantee in the deed to have the latter declared a trustee of the legal title.

SPECIFIC PERFORMANCE.—EVIDENCE TO DEFEAT.—Any evidence that shows that a decree of specific performance, even of a written agreement of sale, would be unfair or inequitable, is sufficient to defeat the application.

SPECIFIC PERFORMANCE—DAMAGES.—If, on the trial of a bill for specific performance of a contract to convey land, it appears that the vendor has made the execution of the agreement impossible, by the performance of a prior contract of sale and the acknowledgment and delivery of a deed in pursuance thereof, his liability upon the second contract is for damages only.

D. W. Sellers, for the appellant.

F. C. Brewster and T. F. Jenkins, for the appellees.

336 WILLIAMS, J. The report of the master shows the facts important to a decision of this case very clearly. The house and lot in controversy appear to have been the sepa-

rate property of Mrs. Powel prior to the fourth day of October, 1892. On that day she and her husband made a verbal agreement for the sale of the property to their next door neighbor, Cockroft Thomas. For some reason which does not appear, her husband went on the following day to B. F. Teller & Bro. and authorized them to make sale of the house and lot for eighteen thousand dollars. They found a purchaser, notified Mrs. Powel, and she signed a memorandum, approving the sale negotiated by them, which is dated on the 6th of October, 1892. On the 18th of the same month she and her husband completed the sale to Thomas by executing and delivering their deed, acknowledged in due form, to his daughter, Susannah M. Heraty, for whose use he desired the property, and to whom he seems to have presented it as a gift. Maguire having refused to surrender or sell his interest under the bargain made by him with B. F. Teller & Bro., now seeks a decree for the specific execution by Mrs. Powel and her husband of the agreement made on their behalf by Teller & Bro., and that Susannah M. Heraty be adjudged a trustee of the title for his use and directed to convey it to him. The ³⁸⁷ Powels, with the same indifference to the rights of others manifested in the negotiations preliminary to the sale, have taken no defense, and a decree *pro confesso* has been entered against them; but Mrs. Heraty denies that she is a trustee of the title for the plaintiff, and insists that she is entitled to hold it for herself.

Upon this question two facts are conclusive: 1. The contract made by her father and in execution of which the deed was delivered to Mrs. Heraty, was the first in point of time. It was made on the fourth day of October. The contract, so far as it was authorized or ratified by her, between Teller and the plaintiff, was on the 6th. It is a maxim of equity that first in time is first in right. Thomas had a right as between himself and his vendors, to insist on his agreement as good against any and all persons acquiring rights subsequently to his own; and Maguire was such a person. It is true that Mrs. Powel was not legally bound by her contract with Thomas, but on the other hand she was under no obligation, legal or moral, to repudiate it. If she chose to recognize and execute it she had a right to do so, and a court of equity will not deny to her this right. 2. Thomas, the purchaser, who paid the price of this property to Mrs.

Powel, and under whose direction the deed was made to Mrs. Heraty, is the party to the contract which we are asked to hold void, and he is a necessary party to this bill for that reason. Mrs. Heraty did not buy from Mrs. Powel. She is a donee of her father who did buy, and who paid the price; and if that contract of purchase and the deed made in pursuance of it are to be adjudged fraudulent and void as against the plaintiff, then beyond all question the actual purchaser should be a party.

The plaintiff insists that he shows the first and only written contract of sale, and that this contract is complete in every essential particular. This is true; but it was the privilege of Mrs. Powel to reply by the fact that she had made an earlier contract of sale which, though not in writing, she felt bound to perform, and that she had accordingly done so. The rule in equity is that any circumstance that shows that a decree of specific execution, even of a written agreement of sale, would be unfair or inequitable is sufficient to defeat the application: *Brightly's Equitable Jurisdiction*, 220. Mrs. Powel did not choose to state ~~the~~ the facts, but they have been made to appear by the other defendants, and have been distinctly found by the master. Even if the evidence upon this subject was conflicting the finding by the master would, when approved by the court below, be regarded as settling the question: *Kutz's Appeal*, 100 Pa. St. 75. But the evidence is not conflicting. There is no denial of the fact that the verbal contract with Thomas was made on the 4th of October. Whether Mrs. Powel was necessarily bound by her contract with the plaintiff it is not important now to inquire. She seems to have assumed her liability, and suffered a decree to be entered *pro confesso* against her.

As she has made the specific execution of the agreement impossible by the performance of a prior contract of sale, and the acknowledgment and delivering of a deed in pursuance thereof, her liability upon the second contract is for damages only, and these can be adjusted by the court below under the judgment *pro confesso*.

As to Susannah M. Heraty and M. P. Heraty, her husband, the decree is affirmed and the bill dismissed, appellant to pay the costs of this appeal. The record is remitted for proceedings under the decree *pro confesso* to ascertain the damages to which the plaintiff is entitled.

SPECIFIC PERFORMANCE—DEFENSES.—Where there are circumstances which will render the operation of a decree of specific performance harsh and inequitable the parties will be left to their remedy at law: *Datz v. Phillips*, 137 Pa. St. 203; 21 Am. St. Rep. 864, and note; *Brown v. Pitcairn*, 148 Pa. St. 387; 33 Am. St. Rep. 834, and note. To the same effect see *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672, and note.

SPECIFIC PERFORMANCE—DAMAGES.—A court of equity may, in cases where the party is not entitled to specific performance, grant relief by decreeing the repayment of the money expended on the faith of the contract: *Green v. Drummond*, 31 Md. 71; 1 Am. Rep. 14. Equity has jurisdiction to grant compensation in all cases of bills for specific performance, though denying the relief sought by the bill: *Rider v. Gray*, 10 Md. 282; 69 Am. Dec. 135, and note.

SEIP'S ESTATE.

[163 PENNSYLVANIA STATE, 423.]

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—Communications by several persons who employ the same attorney in the same business, made by them to such attorney in relation to such business, while privileged as to their common adversary, are not privileged as between themselves.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—An attorney employed by the husband of one of three sisters equally interested in the subject matter of litigation is competent to testify in a subsequent contest between the sisters, involving the same matter, as to who were the partners he represented, and as to the declarations of the husband made during his lifetime, showing for whom he acted in employing the attorney and managing the litigation.

WILLS—CONTEST—COMPROMISE.—No contestant of a will can compromise any thing beyond his personal interest in the contest, and is entitled to no more than his distributive share in a sum received by way of general compromise.

WILLS—CONTEST—COMPROMISE—INTEREST.—One of three parties equally interested in the contest of a will, but made a party defendant, is presumed, in case of a compromise, to be entitled to an equal share with the other parties, and the burden of proof is on them to show a release of interest sufficient to rebut such presumption.

M. C. L. Kline and J. Rupp, for the appellant.

J. S. Biery, T. B. Metzger, and R. J. Butz, for the appellee.

420 **WILLIAMS, J.** The facts to be considered in the determination of this appeal appear in the auditor's report, which was concurred in and confirmed by the orphans' court.

From this report we learn that George Probst died testate in February, 1885, leaving a large estate. He left three half sisters to survive him, Christiana Knauss, Catharine Seip, and Lydia Probst. By his will he gave his estate to certain

of his collateral relatives, excluding his half sisters and other relatives from any share whatever therein.

Those who had been excluded, or some of them, determined to contest the validity of the will; and for these Nathan Seip, the husband of Catharine, appears to have acted as agent. He consulted with and retained counsel, and took general charge of the preparation and conduct of the proceedings. An issue *devisavit vel non* was framed in which Mrs. Knauss and Mrs. Seip were named as plaintiffs, and in which Lydia Probst was named as one of the defendants. This was upon the list for trial, and in a position to be reached in a few days, when it was settled upon the payment of ten thousand dollars to the attorneys for the contestants.

The question now raised is, To whom did the money paid by the proponent belong? Lydia Probst alleges that she was entitled to share with her sisters in it, and they now claim the whole. This controversy was referred to an auditor, who sustained the contention of the accountant, that Lydia Probst was not entitled to share in the money obtained by the settlement.

It should be remembered that the three sisters stood in the same position. They had certain rights under the intestate laws that the will denied. If the estate of George Probst was to be distributed under his will they were all alike excluded. If the will was set aside they would be admitted on exactly the same terms regardless of their apparent position on the record as parties to the issue, and of their contribution to the expenses of the contest. But the auditor and the court below held that the right of Lydia Probst to a share with her sisters depended ⁴³¹ on the answers to two questions: 1. Was she "an active contestant on record with Mrs. Seip and Mrs. Knauss? 2. Did she contribute toward the expenses in carrying on the contest with the understanding that she should share in the proceeds realized"? The evidence relied upon to show that she was a contestant, and had promised to contribute to the expenses, consisted of the testimony of John Rupp, Esq., one of the counsel for the contestants, and the declarations of Nathan Seip, now deceased, made while the contest was being carried on and while it was in process of settlement. The testimony of Mr. Rupp was excluded because of his confidential relations to Mrs. Seip and Mrs. Knauss. The declarations of Nathan Seip were excluded because he

was the husband of the decedent whose estate is now for distribution. The whole of the evidence relating to the questions stated by the auditor being thus taken out of the case, the questions were decided against Lydia Probst, and the two sisters were allowed to retain the share of the third in the money realized from the settlement of the issue *devisavit vel non*. Was John Rupp properly excluded on the ground of privilege? He is an attorney at law, and was employed as counsel for the contestants. If the issue had been on trial and the proponent had undertaken to examine him about what Blackstone calls "the secrets of the cause," which had been communicated to him by his clients, it is clear that the clients could have objected, and relied on the fact that communications made by them to their counsel, relating to the cause, were privileged. But this was not a controversy between the contestants and their adversaries. It was a controversy among themselves. Here were three sisters standing in the same relation to the testator, and having the same interest in defeating his will. Two of them appeared as plaintiffs, and the other as one of the defendants, in the issue. Neither of them appears to have consulted counsel personally, but Nathan Seip, the husband of one of them, did all that was done on behalf of the contestants. Whom did he represent? For whom did Mr. Rupp appear? This is the present question. It is a search, not after some communication by client to counsel, but after a fact that could be inquired into on the trial of the issue, if such trial had been reached. It could have been settled in advance by a rule on counsel to file a warrant of attorney, ⁴³² and this at the instance of the adverse party. It is the fact of employment that creates the confidential relation. Until this relation exists there can be no privileged communication. The mere fact of employment is not privileged, but, from the nature of the relation between client and counsel, it is open to inquiry in any court in which the counsel appears as such. So, for a very obvious reason, the fact of a settlement between litigants and the terms upon which it was made are open to inquiry. An attorney who assisted in adjusting the terms of such settlement is a competent witness to show what the terms were: *Schubkagel v. Dierstein*, 131 Pa. St. 46. If an attorney represents two or more persons he may be called as a witness in a controversy between them, and statements made to him by one of them in the presence of the others will

not be treated as confidential or privileged communications—*Goodwin Gas Stove etc. Co's Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696. And generally, where several persons employ the same attorney in the same business, as, for example, to contest a will, communications made by them in relation to such business, while privileged as to their common adversary, are not privileged *inter sese*: *Jackson v. French*, 3 Wend. 337, 20 Am. Dec. 699; 19 Am. & Eng. Ency. of Law, 139, and note. All have a property in confidential communications made under such circumstances. One cannot waive the privilege for his cosuitor nor enforce it against him: *Beltzhoover v. Blackstock*, 3 Watts, 20; 27 Am. Dec. 330. In this case three sisters had a common interest in defeating their half brother's will. A contest was entered upon. All of them were parties to it. Their position on the record was just what Nathan Seip chose to make it. This contest was settled by him, acting for those interested, for the sum of ten thousand dollars.

The question now raised is, To whom did this money belong? Not to Nathan Seip, for he could not have taken under the intestate laws as an heir of George Probst. It must go, says the learned auditor, to those whom Seip represented, and for whom Mr. Rupp appeared. To disclose their principals both Rupp and Seip are competent, and no one of the parties can successfully interpose the objection of privilege. But Seip is now dead, and his declarations made to Mr. Rupp, showing for whom he acted in making the contest, are objected to on the ground ⁴⁸³ that he is not competent to testify against his wife. But the declarations relate only to his own conduct, and are explanatory of it. They involve no breach of domestic confidence; they relate to no act or contract of his wife; they fix no liability upon her estate. He acted as the agent for his wife, but not for her alone. For whom else did he undertake to act? Who were his principals in the litigation he began, carried on, and finally settled? The auditor finds that he was the agent of Mrs. Knauss as well as of his wife; and in his twelfth finding of fact he says: "That during the progress of the George Probst will contest, and at the time the settlement was consummated and the money paid to the counsel of contestants, Nathan Seip attended to the business affairs of Lydia Probst, the claimant, receiving money for her and paying bills." In other words, he was the business agent of Lydia Probst, in general charge

of her affairs. We can see no way by which the auditor reached the conclusion that he was not her agent in the management of the contest over the will also, except by rejecting the testimony of Mr. Rupp and the declarations of Seip, and then holding, as matter of law, that a compromise which affected the rights of Lydia Probst gave her no interest in the sum received.

We hold that the rejected testimony was competent so far as it was offered to show for whom Seip acted as agent, and for whom Rupp appeared as counsel. This disposes of the questions really raised on this record, but before dismissing the case it may be well to suggest another. Is it true, as the auditor seems to assume, that the money received upon the compromise of a controversy like this belongs only to those who appear as active contestants and contribute money toward the employment of counsel? The statute provides that any person interested may file a caveat, but it is well settled that thereafter the proceedings are not strictly between the parties, but are in the nature of a proceeding *in rem*; and a decree when made is conclusive on all the world: *Ottinger v. Ottinger*, 17 Serg. & R. 142. For this reason it is the duty of the court to see that all persons interested are brought in before a decree is made: *Miller's Appeal*, 159 Pa. St. 562. If this is not done, or if a compromise is effected without notice to any of those interested, and a verdict taken in favor of the will in pursuance of such ⁴²⁴ compromise, the verdict will be set aside on application of the omitted or neglected party: *Hambleton v. Yocum*, 108 Pa. St. 304; or the omitted party may take another appeal if the time allowed has not elapsed: *Miller's Appeal*, 159 Pa. St. 562.

From this it results that no contestant can compromise any thing beyond his or her own personal interest in the contest, and can be entitled to no more than his or her distributive share in a sum received by way of general compromise. This was said in substance by the late Justice Gordon in the opinion delivered in *Hambleton v. Yocum*, 108 Pa. St. 304, and seems to result necessarily from the nature of the proceeding.

The interest of Lydia Probst was identical with that of Mrs. Seip and Mrs. Knauss. For what reason she was put upon the record as a codefendant with the proponent of the will that disinherited her it is probable that no one since the death of Seip can tell. But wherever her agent placed her

on the record, her interest was identical with that of her sisters. She had the same right to appeal from the decree of probate, and the same motive for doing so. There could have been no settlement made without her consent given personally or through her agent. Her acquiescence in its terms was a surrender of her right to contest the will, and her distributive share of the net results of the compromise stood to her in place of her right to contest. In such case the law would presume her joinder with her sisters in the compromise to have been upon the same terms and conditions assented to by them, and that the sum received was to be divided in conformity with the intestate laws. This would shift the burden of proof, and impose on her sisters the duty of showing some contract, release, or state of facts sufficient to rebut the legal presumption and strip her of her rights as "a person interested" in the estate of her half brother.

The decree appealed from is reversed, the record remitted, and a *procedendo* awarded.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS.—If two or more persons consult an attorney at law for their mutual benefit, and make statements in his presence, he may disclose such statements in any controversy between them or their personal representatives or successors in interest, but not in controversies between them, or either of them and third persons: *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482, and note in which similar cases are collected.

FIRST PRESBYTERIAN CONGREGATION v. SMITH

[168 PENNSYLVANIA STATE, 561.]

INDEPENDENT CONTRACTOR'S LIABILITY FOR NEGLIGENCE.—The owner, and not the independent contractor, is liable for injury arising from negligent construction of the work if the owner retains and exercises the right to direct the manner in which the details of the work shall be performed, but the contractor is liable if the power of the owner to direct the construction is confined to the result of the work without any control over the manner in which it is done.

INDEPENDENT CONTRACTORS — NEGLIGENCE — LIABILITY AFTER ACCEPTANCE OF WORK.—If an employee at the time of assuming possession of work from an independent contractor knew, or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction.

INDEPENDENT CONTRACTORS—LIABILITY FOR NEGLIGENCE AFTER ACCEPTANCE OF WORK.—If an accident happens or injury is sustained after

work done by an independent contractor has been accepted by the employer, and he has resumed possession, no recovery can be had by a third party against the contractor for negligence in the construction of the work.

O. H. Meyers, R. I. Jones, and R. C. Stewart, for the appellant.

W. S. Kirkpatrick and H. W. Scott, for the appellee.

⁵⁷¹ DEAN, J. The church of plaintiff is a large brick building on the northwest corner of Second and Bushkill streets, in the city of Easton. On January 2, 1891, Bushkill street, in front of the church, commencing at the line of Second street and extending along the street for seventy-five to eighty feet, caved in, taking with it a portion of the pavement. A large sewer and the water main of the Lehigh Water Company were located longitudinally on Bushkill street, and, after the cave-in, were found to be broken. A great quantity of water from both flowed toward the church, undermined the pavement and saturated the foundation, causing very serious damage to the property.

The plaintiff alleged the damage was caused by the negligent construction of the sewer in this: The church service-pipe connecting with the water-main had broken, and the water flowing therefrom had broken in the sewer, undermined the pavement, and damaged the foundation, before being perceptible from the surface; the ground being frozen at the time, until the cave-in, the crust was not disturbed; the service-pipe broke, it was alleged, because, in constructing the sewer, the ⁵⁷² trench was negligently filled up—the plank sheeting, supporting temporarily the sides of the excavation during construction, being left in, and the cross-timbers permitted to remain resting on the service-pipe, and then the filling up done by puddling instead of tamping. As a result, when the earth settled, the weight wrenched off the service pipe from its connection, and the injury followed.

The plaintiff held the defendants answerable for the consequences of this negligent work at the sewer, because it was averred they had, as independent contractors with the city of Easton, constructed it under a written contract made the 1st of April, 1890, in pursuance of which contract they had finished the work about June 12th following.

At the trial there was much evidence on both sides on the questions: 1. Was the injury caused by the negligent con-

struction of the sewer? 2. If so, then did this negligence consist in following the directions of the city engineer, as provided in the contract?

The court, in a very full charge, submitted the evidence bearing on both questions to the jury. There was a verdict and judgment for defendants, and then this appeal, with thirty-eight assignments of error, each one of them pressed earnestly at the bar and in elaborate argument in voluminous paper-books.

At the trial below, as the case was presented by counsel, and submitted by the court to the jury, the question of negligence was considered first, and that of answerability of defendants second. We reverse this order, and inquire, first, whether, under the contract and evidence, the defendants are answerable, regardless of proof of negligent construction.

If the negligence which caused the injury was puddling up of the sewer-trench, and leaving in the sheeting which rested on the service-pipe, was this the act of the city, or that of the defendants as independent contractors? If the city, by the contract, retained control of the method of performing the work, then, to the extent defendants followed the method prescribed, certainly they were not independent.

The city ordinance, under date of 29th of November, 1889, enacts:

“SECTION 1. . . . The department of sewers is hereby authorized to construct the following described sewers in accordance ⁵⁷³ with the adopted map and plan on file in the office of the city engineer.”

Then follows a detailed enumeration of sewers, main and lateral, according to an elaborate plan. The sewer on Bushkill street is called main sewer B. Then section 4 enacts: “The building of said sewers shall be under the supervision and management of the city engineer.” Paragraph 47 of the contract stipulates that the sewer shall be constructed according to the plans on file, and according to the grades and lines given by the engineer . . . and the sides of the trench shall, at the contractor's expense, be supported by proper timberwork, when required by the engineer, to prevent caving . . . and, after the completion of the brickwork, shall be carefully filled up and tamped around the sewer in horizontal layers of not over six inches, until the filling reaches a height of one foot above the top of the sewer, and then carried up in horizontal layers of not over nine inches, to the surface of the street, or within such distance of the surface as the engineer

shall direct. And the engineer shall have the right to make alterations in the line, plan, form, or quantity of the work; and, in consideration of the completion of the work in conformity with the specifications and stipulations, and in strict accordance with the instructions of the engineer, the city agrees to pay, etc. And so, all through the contract, the intent of the city is to reserve control, not only of how the work shall be done to meet the specifications, but to change or vary the specifications as circumstances might suggest during the progress of it. The contractors had but very little authority, independent of the city engineer; in substance, they were to follow the specifications, unless the engineer directed otherwise when the engineer did direct, then the city exercised the control it had reserved, and the contractors were, as to such work, not independent.

On turning to the evidence touching on the filling of this trench in front of the church we find that, by the ordinance, the sides of the trench were to be supported by timber-work when required by the engineer, to prevent caving, and the completion of the work, by the contract, was to be in strict accordance with his instructions. The brickwork of the sewer having been finished, to complete the work required tamping or puddling, either with the sheeting left on the sides of the ⁵⁷⁴ trench or with it taken out. Then the engineer gives this order:

"EASTON, PA., June 10th, 1890.

"MESSRS. SMITH & MINNAHAN: You will not remove any of the sheet piling now on Bushkill street, between Front and Third streets, as I am afraid by so doing you will interfere with the gas and water mains.

"Yours, truly,

"A. J. COOPER, Engineer."

The city had reserved the right to make such an order, and the contractors were bound to obey it; in so far as leaving the sheeting in was negligence the city was answerable for the consequences.

The engineer further testified that the method of filling up the trench was by his directions; that he directed them to puddle instead of tamping three feet above the archway to the surface, and it was done as he directed; because, in his opinion, puddling, as ordered by him, was better work than tamping. James Smith, one of defendants, who had supervision of the work in front of the church, testified that, after

tamping three feet above the arch of the sewer, from there to the surface it was puddled as directed by the city engineer. There is no evidence in the case which contradicts this testimony tending to show that the work of filling the trench was wholly controlled by the city. There may have been negligence on the part of the city in the methods adopted, but, in giving such directions as were given, there was no usurpation of authority, but only the exercise of an authority reserved, and to be exercised, if the city chose, independent of the judgment of the contractors.

All the authorities cited by appellants, determining the liability of an independent contractor, are to the effect that if the power to direct is only as to the results of the work, without any control over the manner of performing it, the liability of the contractor remains. But this contract reserved far larger powers than mere direction as to results; as to many items of the specifications the right to direct the manner in which the work should be done was retained. In very few of the many specifications was the method of carrying them out left to the skill and judgment of the contractors. Even the right to discharge incompetent workmen was reserved to the city engineer.

575 If these contractors had done this work in front of the church in the mode set out in the specifications, the engineer only giving such directions as would insure his approval of it, the cases cited—*Hunt v. Pennsylvania R. R. Co.*, 51 Pa. St. 475, *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699, and others to the same effect—would apply; but here the case is clearly within the rule laid down in *Allen v. Willard*, 57 Pa. St. 374, that the liability of the employer continues where he has not relinquished his control over the work to be done, and the mode of performing it.

The testimony of Cooper, the engineer, and Smith, the contractor, was admissible, because it tended to show the actual exercise by the city of the right reserved under the contract, the alleged consequence of which was the damage complained of. The plaintiff alleged it was negligence to leave in the sheeting, and to puddle the filling of the trench; the defendants replied, this was not negligence, but, even if it were, the city did it, not we. And there is nothing in the evidence to contradict them. True, if the puddling was negligently done, after the engineer directed the contractors to follow that method, and such negligence occasioned the injury, the

contractors could not escape liability because the city had changed the method. And there was some evidence tending to establish this part of plaintiff's case. It seems to be made more prominent here than in the court below. Appellants' seventh point, however, fairly embraces it, and the refusal of the court to unqualifiedly affirm it would, if another trial could be ordered, be ground for reversal.

But there is another point made by appellees to sustain their judgment which, it seems to us, is conclusive against the appellant. The evidence shows, without dispute, that the Bushkill street sewer in front of the church, between Second and Third streets, was finished by defendants about the 12th of June following the date of the contract, and that outlet connections were soon after made with it. Further, that on August 12th following it was fully completed, and an ordinance was adopted regulating the connections to be made with it by residents, and permits were issued to those entitled to use it. The sewer had been in possession of and in actual use by the city for more than four months before the damage was done the church. The street, the surface of which was twenty feet above the sewer, had been repaired, and all traces of construction ⁵⁷⁶ at this point had disappeared. Clearly the city had in fact resumed full possession of this part of it. That a formal ordinance accepting the whole of the work done in the city under the contract was only adopted October 10, 1891, subject to the conditions of the contract, does not affect the question we are considering. This is not a contention between the city and its contractors, but between a third party and the contractors. It was the defendants' duty to construct the sewer according to their contract; that is, their contract duty, and they were answerable to the city for any breach of it, under certain circumstances, even after the work was taken off their hands. But the injury was caused after the completion of this part of the work, and after it had been in full use and possession by the city for months. An action of this character in this state, against the contractor, rests on the principle that, pending the performance of the work, he is in the place of his employer: *Reynolds v. Braithwaite*, 131 Pa. St. 416. The Pennsylvania rule, deducible from all the cases, is, that if the employer, at the time he resumes possession of the work, from an independent contractor, knew, or ought to have known, or from a careful examination could have known,

that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction. Whatever defects there were in this work, if any, must have been known to the city when they took possession in August, and not only made connection with other sewers for outlet, but with the properties of residents for inlet.

Their engineer, especially qualified, every day during its construction saw the material used and the character of the work; besides, gave special directions as to how it should be done. In *Curtin v. Somerset*, 140 Pa. St. 70, 23 Am. St. Rep. 220, the contractor for a hotel building had completed his contract, and it was accepted by the architect and building committee of the hotel company. Four days afterward, when a number of the guests of the hotel, among them the plaintiff, were on the porch witnessing a display of fireworks, one of the girders supporting the porch gave way, and plaintiff was seriously injured. He brought suit for damages against the contractor, alleging negligence, in that the girder was of hemlock, an unsuitable wood to sustain weight; that it was smaller in size than the contract specification called for; that it was cross-grained, besides had been ⁵⁷⁷ notched with an axe. This court held that an independent contractor who builds a house, bridge, or does any other work owes no duty to third parties after the work is taken off his hands by the owner. The rule laid down in Wharton on Negligence, sections 438 and 439, is decided to be the law: "There must be a causal connection between the negligence and the hurt; and such causal connection is interrupted by the interposition between the negligence and the hurt of any independent human agency. . . . Thus a contractor is employed by a city to build a bridge, and after he has finished his work, and it has been accepted by the city, a traveler is hurt when passing over it by a defect caused by the contractor's negligence. Now, the contractor may be liable on his contract to the city for his negligence, but he is not liable to the traveler; . . . because, between the traveler and contractor intervened the city, an independent, responsible agent, breaking the causal connection."

In the case cited it was held by this court that the court below should have instructed the jury that, as the accident happened after the work had been accepted, and the owner had resumed possession, there could be no recovery by a third party against the contractor for negligence. The Eng-

lish cases, as well as those in this state, were noticed, and it was decided that none of them were in conflict with this principle. The "causal connection," as Mr. Wharton terms it, is broken, not by a resolution or ordinance, but by a fact. Has the contractor abandoned his temporary possession and the owner resumed his permanent one? If so, the answerability of the contractor for breach of duty is to the owner, under his contract, not to third parties, for as to them he no longer owes any duty. He no longer stands in place of the owner, for the latter has resumed his relation to the public.

On this ground alone the defendants were entitled to a peremptory instruction in their favor; and, while the instructions on the first question were not as full and explicit as appellants had a right to ask, no harm was done them, for they, on the whole evidence, were not entitled to a verdict.

The judgment is affirmed, and appeal dismissed at costs of appellants.

STERRETT, C. J., dissented.

MASTER AND SERVANT—EMPLOYER'S LIABILITY TO THIRD PERSON FOR INDEPENDENT CONTRACTOR'S NEGLIGENCE.—An employer is liable for damage which ensues to another by reason of something having been done as a part of the work contracted for in consequence of the employer's interference in such work or any of its details: *Davis v. Levy*, 39 La. Ann. 551; 4 Am. St. Rep. 225, and note; *Linnehan v. Rollins*, 137 Mass. 123; 50 Am. Rep. 287, and note; *Larson v. Metropolitan etc. Ry. Co.*, 110 Mo. 234; 33 Am. St. Rep. 439, and note; *Meier v. Morgan*, 82 Wis. 289; 33 Am. St. Rep. 39; but he is not responsible for the negligence of the contractor when the latter is given entire freedom in the use of means to accomplish a result: *Roddy v. Missouri Pac. Ry. Co.*, 104 Mo. 234; 24 Am. St. Rep. 333, and note; *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. St. 377; 2 Am. St. Rep. 608, and note; *Bennett v. Truebody*, 66 Cal. 509; 56 Am. Rep. 117. This question will be found fully discussed in the notes to the following cases: *Atlanta etc. R. R. Co. v. Kimberly*, 27 Am. St. Rep. 241; *City of Erie v. Caulkins*, 27 Am. Rep. 647; *Harrison v. Collins*, 27 Am. Rep. 702; *Stone v. Cheshire R. R. Corp.*, 51 Am. Dec. 200; and *Blake v. Ferris*, 55 Am. Dec. 318.

McCOLLUM v. RIALE.

[163 PENNSYLVANIA STATE, 603.]

MECHANICS' LIENS. — SECRET AGREEMENT AGAINST. — A materialman who furnishes material on the order of the record owner of land, without knowledge of a secret conveyance thereof to another, or of a verbal agreement between the vendor and purchaser that the former is to build a house on the land for the latter, and not to allow any mechanic's liens to be entered against it, is not bound by such conveyance or agreement, and is entitled to a mechanic's lien against the property.

ACTION by McCollum against Riale and Messenger to enforce a mechanic's lien for material furnished in the erection of a house. Judgment for the defendants, and the plaintiff appealed.

W. M. Stephens, for the appellant.

H. T. Ames and T. H. Hammond, for the appellee.

607 **McCOLLUM, J.** Four-fifths of the materials for which this claim was filed were furnished on the order of Messenger while he was the apparent owner of the lot, and all of them except the transom door frames were furnished before the materialman was informed that Riale had any legal or equitable title to or interest in it. All the appearances were in accord with Messenger's representations, when he ordered the materials, that they were for a house he was building on his lot on Park avenue. His deed for the lot was on record, and there was no visible change in his possession of it. There was absolutely nothing discernible anywhere to suggest or in the remotest degree indicate any change in his relations to the property, or that in erecting a house upon it he was the representative or agent of another. In short, the record, the appearances, and Messenger's representations to the appellant united in presenting the case of an owner of a lot ordering the materials for and erecting a house 608 upon it. But it is urged that the appellant is not entitled to a lien for his claim because: 1. In August, 1889, Messenger verbally agreed with Riale to sell the lot to him, and that in pursuance of this agreement a deed of it was made and delivered to the latter on the 5th of October following; and 2. That soon after the agreement to sell the lot he verbally agreed with his vendee to build for him a house upon it, and "not to allow any lumberman's or mechanic's lien to be entered against it." The agreement in respect to the

erection of the house was not reduced to writing and signed until September 26, 1889, or six days after the materials were ordered, nor was any thing paid on the lot until that time.

The appellant, whilst conceding the principles enforced in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, and kindred cases, contends that upon the facts above recited he is entitled to a lien upon the building for materials furnished and used in its construction. In considering this contention it must be remembered that when Messenger ordered the materials for the house he was the owner of the lot and his title to it was shown by the record. Riale had then no enforceable equity or claim in or upon the lot because the verbal agreement gave him none, and he had done nothing in pursuance of it which prevented his vendor from successfully repudiating it. Messenger's possession of the lot when he commenced the erection of a house upon it was in accord with his title, and so were his representations that the materials he ordered were for a house he was building on his lot on Park avenue. What was there in the circumstances surrounding the transaction to suggest to the materialman the existence of an equitable interest or title in Riale, or any one else, or to put upon him the duty of further inquiry? Absolutely nothing. The case before us is therefore wholly unlike the cases relied on by the appellees, in which it is held that a subcontractor is bound by a stipulation against liens, in the contract between the owner and the principal contractor. In none of them is it held or suggested that a secret verbal agreement, such as is interposed here, will prevent or defeat a lien. They were cases in which the labor was done or the materials were furnished on the order of or under a contract with the principal contractor who was known as such, not, as in this case, on the order of, or under a contract with, ⁶⁰⁹ the apparent owner. In them the subcontractor was chargeable with knowledge of the contract between the owner and the principal contractor, because he had an opportunity, and it was his duty to ascertain its terms before performing labor or furnishing materials on the credit of the building. In this case no such opportunity was presented or duty imposed. It is in accordance with equity that the subcontractor should be bound by the terms of the contract between the principal contractor and the owner, in the former case, and against it to hold him bound by the terms of the secret agreement relied on in this case to defeat the claim of the appellant.

We hold, therefore, that the appellant is entitled to a lien for the materials furnished before he knew or ought to have known that such agreement existed.

To the extent that the rulings of the learned court below are in conflict with this opinion the specifications of error are sustained.

Judgment reversed, and *venire facias de novo* awarded.

MECHANICS' LIENS.—To prevent a contractor or subcontractor from filing a lien against a building there must be an express covenant against liens or a covenant resulting as the necessary implication from the language employed: *Nice v. Walker*, 153 Pa. St. 123; 34 Am. St. Rep. 688, and note. See, also, the note to *Benedict v. Hood*, 19 Am. St. Rep. 699, 700.

CAMPBELL v. FOSTER HOME ASSOCIATION.

[163 PENNSYLVANIA STATE, 609.]

POWER OF ATTORNEY TO SELL—AUTHORITY TO MORTGAGE.—A letter of attorney with naked authority to sell and convey, uncoupled with any interest in the land or fund, does not authorize the attorney in fact to execute a bond and mortgage in the name of the principal.

POWERS OF ATTORNEY ARE STRICTLY INTERPRETED, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect.

POWER OF ATTORNEY TO SELL—AUTHORITY TO MORTGAGE.—A power of attorney to sell and convey real estate, not coupled with an interest, does not confer power to mortgage, and a mortgage executed under such a power is void.

SUBROGATION—RIGHT OF VOLUNTEER TO.—A mere volunteer who, without any duty, moral or otherwise, pays the debt of another, is not entitled to subrogation. Subrogation does not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a debt against a common debtor.

SUBROGATION—VOLUNTEER—MORTGAGES.—A mere volunteer who pays off a mortgage without the knowledge or consent of the mortgagor is not entitled to be subrogated to the rights of the mortgagee under his mortgage.

BILL in equity for the cancellation of a mortgage. Judgment for the plaintiff, and the defendant appealed.

John G. Johnson, for the appellant.

T. Hart, Jr., and J. G. Lamb, for the appellee.

630 GREEN, J. After a laborious study of this case, and a most serious consideration of the elaborate and exhaustive arguments of the learned counsel on both sides, we are con-

strained to say that we think the case was correctly decided in the court below. On the question whether the letter of attorney from the plaintiff to her attorney in fact, Robins, dated December 26, 1888, is to be construed as conferring a power to mortgage the premises in question, we are quite clear as to the correctness of the decision made both by the master and the court below. It is true ⁶³¹ the precise question does not seem to have been before us heretofore, but we are convinced that the considerations which prevailed in *Lancaster v. Dolan*, 1 Rawle, 231, and its train of cases, resulting in the declaration that a power to sell land includes a power to mortgage, are entirely inapplicable in the interpretation of a mere letter of attorney with a naked authority to sell, uncoupled with any interest in the land or the fund.

The instrument now in question was essentially of this latter class. So far as this matter is concerned it is in the following words: "Do make, constitute, and appoint William B. Robins of said city, attorney at law, my true and lawful attorney, for me and in my name, to grant, bargain, and sell in fee simple all real estate owned by me, including all ground rents, on such terms and for such prices as he may see fit, and to make, execute, and deliver all necessary deeds and assurances to the purchasers, and to assign all policies of insurance on said properties or with said ground rents."

It cannot be questioned that this is but an ordinary letter of attorney to sell real estate in fee simple. It is nothing but a naked authority to sell and make deeds to the purchasers, without any interest whatever in the proceeds, without any power to invest the same, or to exercise any kind of control over them. There was no power to raise money for any trust, or to pay debts or charges, or to provide a fund for any charitable or other purpose, or for the support of any third person. In short, there was no power of any kind whatever to do more than simply to sell the property and to make deeds to the purchasers.

Under this narrow, specially defined, and closely limited authority the agent executed a bond in the name of his principal for the payment of seven thousand five hundred dollars, and to secure the payment of the bond he executed a mortgage of her real estate, also in her name, and thereby made her a debtor in a large sum, when his only authority to act for her was to sell her real estate and bring her the proceeds. Instead of being the seller of real estate in the en-

joyment of the fruits of the sale, she was converted into a debtor with all the duties and obligations which that relation implies. We do not know of any doctrine in the law of principal and agent which will permit such a result to be accomplished in such a mode. The books abound with endless decisions which are in utter hostility with such a transaction as a valid act.

632 Being a debtor the plaintiff would be subject to an obligation to pay, not only the principal sum of seven thousand five hundred dollars, but also annual sums of interest. For failure in her payments she would become personally liable for the moneys due, and be subject to a general judgment which would be a lien upon all her real estate, and upon which process of execution might issue and be levied upon her personal property. In point of fact, a warrant of attorney for the entering of judgment against her for the debt was contained in the bond executed in her name by her attorney, under an authority which gave him only a bare right to sell her lands. It is not credible that the citizen can be held subject to such consequences, so entirely inconsistent, unexpected, and hostile to his express intent, in an instrument of such a character. Whatever else may be said of such a paper, it must be conceded that, in its terms, and in its legal substance, it is a plain, simple letter of attorney establishing the relation of principal and agent between the parties to it. It must therefore be regarded as subject to the rules and requirements of that branch of the law in any event, and if these will not permit it to be used for an ulterior purpose such as is claimed in the present case, then it cannot be so used.

Regarded simply as a letter of attorney establishing an agency, the law concerning it is very clear. Thus, in *Devinney v. Reynolds*, 1 Watts & S. 328, Mr. Justice Rogers, delivering the opinion, said: "An agent constituted for a particular purpose and under a limited power cannot bind his principal if he exceeds his power. A special power must be strictly pursued, and whoever deals with an agent constituted for a special purpose deals at his peril when the agent passes the precise limits of his power." This was said of a deed made by an attorney in fact who was authorized to convey a tract of land after he had redeemed it, and he conveyed it without redemption, and it was held the purchaser took no title.

In Story on Agency, edition of 1882, section 68, the author says: "Indeed formal instruments of this sort (letters of attorney) are ordinarily subjected to a strict interpretation, and the authority is never extended beyond that which is given in terms or which is necessary and proper for carrying the authority so given into full effect. Thus a power of attorney to sell, assign, and transfer stock will not include a power to pledge it for the ⁶³⁸ agent's own debt": 1 Jones on Mortgages, sec. 129. A mortgage executed under a power of attorney, authorizing an attorney to sell and convey only is void. Said Mr. Justice Cooley in *Jeffrey v. Hursh*, 49 Mich. 31: "J. M. Hursh had power to sell the land, but not to mortgage it. The power is not to be extended by construction. The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgage: *Wood v. Goodridge*, 6 Cush. 117; 52 Am. Dec. 771; *Albany Fire Ins. Co. v. Bay*, 4 N. Y. 9; *Ferry v. Laible*, 31 N. J. Eq. 566; *Kinney v. Matthews*, 69 Mo. 520; *Patapsco etc. Co. v. Morrison*, 2 Woods, 395; *Deraynes v. Robinson*, 24 Beav. 86."

In the case of a naked power, not coupled with an interest, every prerequisite to the exercise of that power should precede it. A power to make and execute deeds to convey real estate, as the same may be sold to purchasers in tracts by a third party, is a naked power to convey as sales may be made, and a deed made otherwise is a fraud upon the power: *Deputron v. Young*, 134 U. S. 241.

As a general rule a power to sell and convey real estate does not confer a power to mortgage, and a mortgage executed under a power of attorney to sell and convey is void. The court said: "The power of attorney in this case by Mary C. Hargin to Charles S. Hargin is a power to sell and convey only; therefore the mortgage executed by Charles S. Hargin to Moses Sherburn, under this power of attorney, is void": *Morris v. Watson*, 15 Minn. 212.

In the case of *Wood v. Goodridge*, 6 Cush. 117, 52 Am. Dec. 771, a power of attorney authorized the attorney, in the name and for the benefit of the principal, to buy and sell real and personal property, and to execute and deliver deeds, to transfer the same, to move and institute all necessary suits for the recovery and collection of his demands. . . . Es-

pecially to carry on his sawmill and buy and sell logs and lumber . . . and in general to make such contracts for the profitable improvement and use of such property and other means as he possessed, for the enlargement of his estate. The attorney made a mortgage and note for a sum of money, and the question of his power to make them ⁶²⁴ arose and was decided. The court said: "Levi Goodridge, who made the mortgage and note, had no authority under his power of attorney from Benjamin Goodridge to do these acts, so that the mortgage and note are both invalid and without any legal effect. In accordance with the general and well-settled principles of law, the power of attorney to Levi must be so interpreted as not to extend the authority given to him beyond that which is given in terms, or which is necessary and proper for carrying the authority expressly given into full effect. Now, the power of attorney in this case very clearly did not in terms give to Levi authority to mortgage the real estate of his principal; still less does it, in terms, give him the power to borrow money and to bind his principal by a promissory note. . . . In the absence of all evidence that the money was in fact obtained for the principal, or that it was necessary for the execution of the authority given, there being no express authority to make a mortgage or negotiable note, there is an entire failure to show that Levi had any authority to make the note and mortgage, and the title of the plaintiff, being derived under that mortgage, wholly fails."

It is not necessary to quote further authorities for a proposition so plain in its character, and not opposed by any contrary decisions. As we have already said, the cases of *Lancaster v. Dolan*, 1 Rawle, 231, and those that follow it, are not pertinent to the discussion, because they depend upon different principles and upon facts which have no existence here. We are, therefore, brought to the consideration of the remaining question whether the appellant is entitled to subrogation to the six thousand dollars prior mortgage which was paid off with the proceeds of the mortgage in suit.

Upon that subject it is to be observed that the payment of the prior mortgage was the act of a mere volunteer. The plaintiff was not consulted about it and had no knowledge of it. There was no privity of any kind between the plaintiff and the defendant, and the latter was under no compulsion to make the payment for the protection of its interests. The payment was doubtless made so as to make its mortgage a

first instead of a second mortgage. But that consideration would give no right of subrogation to the holder of the second mortgage. It seems to us that the case of *McCleary's Appeal*, 20 Week. Not. Cas. 547, covers every aspect of this. There the first mortgage was an undoubtedly ⁶²⁵ valid lien upon the property for nine hundred and twenty-five dollars. The second mortgage was a forgery, and the holder, as here, desiring to have the first lien extinguished, paid six hundred dollars of the mortgage money, fourteen hundred dollars, to the agent of the owner of the property, who, with three hundred and twenty-five dollars furnished by the owner, paid the nine hundred and twenty-five dollars due on the first mortgage, had it satisfied, and surrendered the bond and the mortgage to the owner. When the forgery was discovered, the holder of the second mortgage filed a bill praying a cancellation of the entry of satisfaction and subrogation. Both the court below and this court held that this could not be done, and dismissed the bill upon the express ground that, although the first mortgage was an unquestioned lien, and the money, to the extent of six hundred dollars, was paid by the holder of the second mortgage, he was a mere volunteer in making such payment, and was not entitled to subrogation.

The same doctrine was enforced in the case of *Webster's Appeal*, 86 Pa. St. 409, the syllabus of which is as follows, viz: While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor. There the maker of a promissory note for seven hundred dollars gave a judgment for that amount to his indorser to protect him against liability on his indorsement. Afterward, at the maturity of the note, another person consented to indorse a new note to take up the first one upon the express assurance of the maker that the judgment should be assigned to the second indorser for his protection against liability for the same debt. The judgment was assigned shortly after to the second indorser, who was ultimately obliged to pay the note. The property of the maker being sold upon execution process, the holder of the assigned judgment claimed a share in the distribution of the proceeds as against judgments obtained subsequently to

the assigned judgment. Priority in the distribution was allowed to be assigned judgment in the court below, but this court reversed the decree, holding that the second indorser was a mere volunteer, and that, as the first judgment had served its purpose of protecting the first indorser, it could not be used ⁶³⁶ to protect the second indorser, although assigned to him for that purpose by the first indorser as a condition of the second indorsement. While we decided that if the judgment had been held by the bank which discounted the note, as a part of their security, subrogation would have been granted, even against intervening judgment creditors, we held also that it could not be granted to one who came in as the indorser of a new note given to take up the first note, because he was a stranger to the first contract, and was to be regarded as a mere volunteer. Woodward, J., said: "While subrogation is founded on principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer, who without any duty, moral or otherwise, pays the debt of another: *Hoover v. Epler*, 52 Pa. St. 522. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor: *Mosier's Appeal*, 56 Pa. St. 76; 93 Am. Dec. 783. . . . There was no privity of interest and no contract relation between Bauer and Banker. Bauer could create no duty to himself by a volunteered intervention for Banker's relief. He became Adam's indorser without being under any legal or moral compulsion, and he had no existing interest, ascertained or contingent, to protect. He had no equity to entitle him to subrogation."

So here the payment of the six thousand dollars due under the first mortgage was not made under any compulsion, or for the protection of any rights or interests previously acquired. The defendant simply loaned the money, and, in order to remove a prior lien, paid it off without the knowledge or consent of the plaintiff. If a right of subrogation is acquired in such a state of facts we see no reason why it may not exist in every case of officious payment of the debt of another. Yet it is perfectly clear under all the authorities that such payments do not give any right of subrogation to the debt discharged.

In Beach on Modern Equity Jurisprudence, section 801, the writer says: "But one who is only a volunteer cannot

invoke the aid of subrogation, for such a person can establish no equity. He must have paid upon request or as surety, or under some compulsion made necessary by the adequate protection of his own right. In such a case, instead of creating any right of subrogation, the payment operates as the absolute ⁶³⁷ discharge of the debt so paid. Thus one who discharges an encumbrance upon property which he has no interest in having relieved is not thereby subrogated to the rights of the holder of the encumbrance; and the loaning of money to discharge a lien does not subrogate the lender to the rights of the lienholder."

Sheldon, in his work on Subrogation, section 240, says: "The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."

There can be no question of the soundness of the foregoing propositions, and, where the facts are such as to make them applicable, they are controlling. We think, for reasons already stated, they are directly applicable to the undoubted facts of the present case. It is not practicable, within the proper limits of a judicial opinion, to engage in a critical review of the numerous decisions cited in the arguments of counsel on both sides. A great many of them furnish their own answer when the facts which distinguish them are duly noted and considered. Others, which are apparently in point, are affected by the presence of exceptional circumstances which authorize the introduction of different principles with a controlling effect. But a minute and patient attention to, and consideration of, the very able and exhaustive argument for the appellant has failed to convince us of any error in the treatment of the case by the learned master and the court below, and, substantially for the reasons stated by them, we think the decree should be affirmed.

Decree affirmed and appeal dismissed at the cost of the appellants.

POWERS OF ATTORNEY ARE STRICTLY CONSTRUED: *Frost v. Erath Cattle Co.*, 81 Tex. 505; 26 Am. St. Rep. 831, and note; *Harris v. Johnson*, 54 Minn. 177; 40 Am. St. Rep. 312, and note. See, also, the extended note to *Davenport v. Parsons*, 81 Am. Dec. 777.

ent a balance due on the purchase price of a fire-engine sold and delivered to respondent in the year 1890, the suit being based on a note in words as follows:

143 "\$1250.

Feb. 20, 1891.

"Two years after date, we promise to pay to the order of La France Fire Engine Co. twelve hundred and fifty dollars, with interest thereon at 8 per cent per annum from date until paid, at First National Bank, Mt. Vernon, Wash.

"THE TOWN OF MT. VERNON,

"Per H. Clothier, Mayor of Mt. Vernon, Wash.

"Attest: Fred G. Pickering, Clerk. [SEAL]"

The defendant demurred to the complaint for the reasons: 1. That the complaint did not state facts sufficient to constitute a cause of action; and 2. That the plaintiff had no legal capacity to sue. The demurrer was sustained by the court upon the second ground, viz., that the plaintiff had no legal capacity to sue, in that the complaint did not show that the appellant had complied with the laws of the state requiring foreign corporations to file certain papers with the secretary of state, as provided for in sections 1524 to 1531 of the General Statutes.

It is conceded that appellant has not complied with the laws of this state requiring foreign corporations to file copies of their charters, etc., but appellant contends that respondent cannot question its right to sue in our courts on contracts made with it in its corporate name after having received the benefit of such contracts.

It is a general proposition, sustained by the weight of authority, that, where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other; at least, no other penalty will be implied: See Morawetz on Private Corporations, sec. 665, and cases cited. Our statute does not provide that the contracts made by foreign corporations which do not comply with the provisions of the statute shall be void, but fixes a special penalty for such a violation, and, in the absence of a special declaration that such contracts shall be void, especially where a penalty is attached for the violation, the party contracting with such corporation will be estopped 144 from pleading the want of compliance with the statute by the foreign corporation. This rule was announced by this court, after a pretty thorough investigation of the subject, in *Dearborn Foundry Co. v. Augustine*, 5 Wash. 67, and, as we

are satisfied with the rule announced in that case, we will follow it in this.

It is claimed by the respondent that it was held by this court in *Huttig Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122, that a foreign corporation had no right to begin suit without first filing copies of its articles of incorporation, appointing an agent, etc. An investigation of that case shows that this court simply held that the filing of articles of incorporation by a foreign corporation and the appointment of an agent after the filing of a lien notice, and before suit to foreclose the same, was a sufficient compliance with the law relating to foreign corporations doing business within the state. This possibly might be construed as an implication in favor of respondent's theory, but certainly it did not go farther than that, and was not a necessary implication, as the circumstances of that case show.

It is also urged by respondent that no authority existed in respondent, or any of its officers in its behalf, to make such a note. The complaint shows that this was a simple contract between the city of Mt. Vernon, by its accredited agents, and the appellant, and that the note was given as part purchase price of the engine purchased; that it was issued under and by authority of the council of said city of Mt. Vernon; that the appellant is now the owner and holder of said note; that certain payments have been made by the issuance of warrants upon the treasury of said city, and that there is now due and owing the sum of fourteen hundred and sixty dollars, which said claim has been duly presented to the defendant's council, and that the defendant by and through its council repudiated said note and obligation, and refused to pay the same.

¹⁴⁵ It seems to us that a plain contract is stated by this complaint; that if it had not been reduced to writing, or had not been in the shape of a note, which it is claimed the respondent had no authority to make, a good and enforceable contract is notwithstanding pleaded; that the claim was presented and refused, and that appellant's only remedy would be to sue the respondent and obtain a judgment. This judgment, of course, is only payable through the medium of a warrant drawn upon the treasury of the city; but, if the council refused to allow the claim when it was presented, we know of no other way by which the city could be compelled to issue the warrant than by obtaining a judgment in favor

of appellant for the amount which was found to be due to it under the contract.

For the reason, then, that the court erred in sustaining the demurrer on the ground that the appellant had no legal capacity to sue, and for the further reason that the complaint stated facts sufficient to constitute a cause of action, the judgment will be reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

HOYT, SCOTT, and ANDERS, JJ., concur.

MR. JUSTICE STILES dissented on the ground that a municipal corporation has no implied power to issue promissory notes. That there is only one way that a town treasurer can pay out its corporation money, and that is on warrants signed by the mayor and countersigned by the clerk. No warrant can be issued until a claim has been presented to, and audited by, the council, and the warrant must specify the purpose for which it is drawn: Wash. Gen. Stats., sec. 675. The note in suit failed to show for what purpose it was drawn, and as it was not a warrant, the city treasurer had no right to pay it. Although it was signed by the mayor and clerk of the city, nothing appeared from the pleadings to show by what pretended authority it had been so signed, nor was it anywhere made to appear that it was the note of the municipal corporation. For these reasons the complaint failed to state a cause of action against the city.

FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATUTE—CONTRACTS—ESTOPPEL.—If the laws of a state provide that foreign corporations may register in the manner therein prescribed, and shall then be entitled to the privileges of domestic corporations, but, if any of them shall do business without such registration, it shall incur a penalty not exceeding five dollars per day for every day during which it carries on business, this is not a prohibition against its doing business, and therefore a contract made by it, though it had not registered, is valid and enforceable: *Edison etc. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370; 40 Am. St. Rep. 910, and note.

COUNTY OF SPOKANE v. ALLEN.

[9 WASHINGTON, 229.]

OFFICERS—ESTOPPEL TO DENY OFFICIAL CAPACITY.—If, under the provisions of law, the office of county attorney is the same as that of prosecuting attorney, one who, though elected as county attorney, assumes the duties of the office of prosecuting attorney, and collects delinquent taxes as such officer, is estopped to deny that he is filling that office in an action against him by the county to recover for taxes so collected by him.

OFFICERS—ATTORNEY FEES FOR COLLECTING TAXES—EXTRA COMPENSATION. Attorney fees paid by delinquent taxpayers upon tax collections made by a county attorney whose duty it is to collect such taxes and whose salary is fixed by law cannot be retained by him as compensation for

duties extrinsic to his office. The retention of such fees by him is extra compensation, and contrary to a constitutional prohibition upon the increase of the compensation of a public officer during his term of office.

OFFICERS—OFFICIAL BONDS—LIABILITY OF SURETIES.—Sureties on an official bond are presumed to take notice of the fact that changes may be made concerning the duties of their principal, and when those changes are made in matters of minor importance, which as a whole do not substantially increase their liabilities, they are not exonerated nor released by such changes.

OFFICERS—OFFICIAL BONDS—LIABILITY OF SURETIES.—If an entirely new and distinct class of duties, not germane to the office, are imposed upon a public officer, his sureties are not liable to answer for the faithful performance of the added responsibilities.

OFFICERS — OFFICIAL BONDS — LIABILITY OF SURETIES FOR ADDITIONAL DUTIES IMPOSED ON OFFICER.—If, after a county attorney has been elected, given an official bond, and has assumed the duties of the office, a statute is enacted imposing upon him the new and additional duties of collecting and accounting for delinquent taxes, such duties are not germane to his original office, and the sureties on his official bond are not liable for the nonperformance by him of the new and additional duties thus imposed.

Turner, Graves & McKinstry, for the appellants.

R. B. Blake and F. T. Post, for the respondent.

220 DUNBAR, C. J. This is an action upon the alleged official bond of appellant, S. G. Allen, as prosecuting attorney of Spokane county, joining the sureties in said bond with their principal as parties defendant.

At the general election held in Spokane county on November 4, 1890, Allen was voted for and declared elected to the office of prosecuting attorney for the county of Spokane. On January 10, 1891, he qualified and gave the bond sued upon, and entered upon the discharge of his official duties. The pertinent condition of the bond was as follows: "If said S. G. Allen shall well and truly perform all the duties required of him by law as prosecuting attorney aforesaid, and shall pay over any and all moneys that may come into his hands as such, then this obligation shall be void; otherwise of full force and effect."

221 On February 3, 1891, the legislature passed an act providing that all officers elected as county attorneys at the last general election should be declared to be prosecuting attorneys. Subsequent to the time when appellant executed the bond in question, to wit, on the ninth day of March, 1891, the legislature imposed upon the prosecuting attorneys of the state the duty of collecting delinquent taxes upon real

estate, providing the manner in which they should prosecute by suit, and providing for attorney's fees in such cases. Allen, in the capacity of prosecuting attorney, during the year 1892, brought many of these actions for the collection of delinquent taxes and retained the attorney's fees provided for by the statutes in such cases, and, upon settlement with the county, refused to account for them, claiming that under the law he was entitled to the same. The agreed statement of facts is much more elaborate, and contains other statements, but the foregoing is sufficient for the purposes of this opinion.

The disposition we are compelled to make of this case renders it unnecessary to discuss the first technical objection made by the appellant, viz., that the complaint does not state a cause of action, for the reason that it does not appear affirmatively that the delinquent taxes described were taxes collected on real estate instead of personal property. We do not think there is any merit in the contention of appellant that there was no such officer, at the time the bond was given, as prosecuting attorney of the county. Outside of the facts in this case, which show that Allen was elected as prosecuting attorney for Spokane county, and gave his bond as prosecuting attorney for said county, we think, considering the provisions of the statute with relation to the provisions of the constitution, that the office of county attorney is identical with that of prosecuting attorney.

We have examined with attention and pleasure the many ~~232~~ cases cited by both appellant and respondent on the question of *de jure* officers and *de facto* officers, but in this case the appellant Allen has assumed that the law applied to him or to the office which he held; he performed the duties of the office, and, if we understand his position, seeks to retain the benefits of the application of the law to the office which he assumed. If he is not entitled to the fees and emoluments by reason of the applicability of the law to the office which he held he is not entitled to them at all. These considerations, of course, as we shall hereafter see, do not apply to the sureties, but Allen is estopped from asserting them as a reason for not returning this money to the county.

Nor can we sustain the contention that it was the intention of the legislature that the attorney's fees provided for in the collection of delinquent taxes should be appropriated by the county attorney as compensation for duties extrinsic to

the office. Section 25 of article 2 of the constitution provides that the compensation of any public officer shall not be increased or diminished during his term of office; and section 8 of article 11 provides that the legislature shall fix the compensation by salary of all county officers except certain officers, which exceptions do not embrace the office in question, and provides again that the salary of any county, city, town, or municipal officer shall not be increased or diminished after his election; and the legislature at its next session after the adoption of the constitution proceeded to carry these provisions of the constitution into effect by fixing the salaries of the county officers, including that of the county attorney.

It would seem that giving a plain interpretation to the language of the constitution, twice expressed, would be conclusive of this proposition; but appellant cites this court to one of its own decisions, viz., *State v. Carson*, 6 Wash. 250, in support of his contention ²³³ that the provisions of the constitution above cited do not preclude the legislature from increasing the compensation of public officers, where the performance of extrinsic services is imposed upon such officer. We do not think that the doctrine enunciated in that case should in any event be extended, though it is plainly distinguishable from the case at bar. In that case the court held that a legislative act which provided that the county treasurer should be charged with the duty of assessing and collecting city taxes, and that the city should pay him therefor the sum of five hundred dollars per year, did not violate the constitutional inhibition against increasing the compensation of any public officer during his term of office. It will be seen that the new duty there imposed was absolutely extrinsic, and in no way connected with the performance of his duties as a county officer. The business was for another municipality, and the additional compensation came from the other municipality, and, so far as construing the intention of the legislature is concerned, that body especially provided (Laws 1893, sec. 10, p. 70), in plain terms that the city should pay the treasurer that amount. But the legislature has made no such provisions in relation to the county attorney, either in direct terms or by implication. It is true that the laws of 1891 (Laws 1891, sec. 105, p. 321), provide for the payment of attorney's fees by the delinquent taxpayer, but they do not provide, as in the case of the treasurer above cited, that they shall be paid to the attorney who is authorized to bring the

action; and we have no doubt that the intention of the legislature was that such fees were intended to reimburse the county for extra expenses incurred by the county in furnishing additional assistance to the county attorney in the performance of the additional duties imposed upon him.

But the responsibility of the bondsmen, as we have before intimated, rests upon entirely different grounds. It ²³⁴ was the privilege of the attorney, in case he thought the new duties could not be legally imposed upon him, to refuse to perform them, or, if he was not willing to rely upon that position, to resign the office. But the responsibility of the sureties could not be made to depend upon his decision or choice in either of these contingencies. They contracted with the county with reference to the law in force at the time the contract was executed, and the law that was then in force was the law which was incorporated into and became a part of their contract, and not some law which the legislature might pass at some subsequent time which would greatly increase their risk. Of course, sureties on an official bond are presumed to take notice of the fact that changes will be made concerning the duties of their principal, and, where these changes are made in matters of minor importance, which as a whole do not substantially increase their responsibilities, the sureties will not be exonerated. But wherever an entirely new and distinct class of duties, not germane to the office, are imposed upon a public officer, the sureties are not bound to answer for the added responsibilities. The general rule is thus stated by Mechem on Public Officers, sections 305, 306.

“The contract entered into by the sureties is ordinarily to be construed by reference to that law, and that only, which was in effect at the time their contract was made, and which they then had in contemplation. . . . As a rule the sureties upon an official bond can be held liable for the faithful performance of those duties only which adhered or were germane to the office at the time their undertaking was entered into, and not for other and different duties added to the office after the execution of the bond. Where the bond is given to secure the faithful execution of a given office, and, after the execution of the bond, the whole nature of the office is changed, the bond ceases to be obligatory, because the office is no longer the same within the meaning of the bond.”

235 In this action it seems to us that the new duties imposed were not in any way germane to the office at the time their undertaking was entered into. At that time the bond which the county attorney was required to furnish was more or less a simply formal requirement; but the legislature afterward imposed upon him duties and responsibilities which before that time had attached to the offices of treasurer and sheriff, viz., to assume the responsibility of collecting and being responsible for large amounts of money. Many persons would be willing to go upon the bond of an attorney who would not be willing to make themselves responsible upon the bond of a treasurer, whose principal duty it is to collect, care for, and account for money. It is well understood that a bond of this nature would carry with it more risk and responsibility than a bond given by an officer for the performance of mere clerical or professional duties, and it is not right to assume that this new and absolutely distinct duty and responsibility which is imposed upon the county attorney and through him upon his sureties should have been taken into consideration or contemplated by the sureties when they executed the bond in question. Certainly, if the office of county treasurer had been abolished by the legislature and all the duties of that officer imposed upon the county attorney, it will not be contended that the sureties on the bond of the attorney, given prior to such change, would be held responsible for any delinquencies of their principal in the performance of the new duties imposed; and, where a portion of those responsibilities which are distinct from the ordinary responsibility of the county attorney are imposed, the principle is the same; the only difference is in degree.

In *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, this court held that, where the legislature had extended the term of office of an officer beyond the limit fixed by law at the time of his election and qualification, the sureties upon 236 his bond could not be held liable for his official acts during such extended term, for the reason that the sureties had a right to take into consideration the requirements of the law, so far as their principal was concerned, which was in existence at the time that the contract was made; and it seems to us that it would be just as inequitable to hold here that the sureties had in contemplation a requirement imposing an entirely different character of responsibility upon their

principal, which was afterward imposed by the legislature. There, this court said, no doubt the central idea was that the term of office was for two years, and here, no doubt, the central idea was that the sureties were to become responsible for the faithful performance of the duties which were then imposed by law upon the principal, and not for the duties which might afterward be imposed. It is not the fault of the sureties that the legislature did not provide an additional bond to be given by the county attorney as tax collector when these additional burdens and responsibilities were imposed upon him. This is in harmony with the rule also laid down by 2 Brandt on Suretyship and Guaranty, section 548, that "As a general rule the sureties on an official bond are liable for the faithful performance of all duties imposed upon such officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belonged to and come within the scope of the particular office. They are not, however, liable for after-imposed duties which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed."

Assuming the correctness of the law thus announced, it seems to us unreasonable to presume that the sureties could have contemplated the imposing of these absolutely distinct duties upon the prosecuting attorney, which not only did not properly belong to and come within the scope of his office, but which had by the settled policy of the law for many years been invested in other officers.

²³⁷ The judgment will be reversed, and the cause remanded with instructions to dismiss the action.

ANDERS, SCOTT, and STILES, JJ., concur.

Hoyt, J., dissenting. One of the duties of the prosecuting attorney under the law in force at the time the bond in question was executed was to prosecute suits in favor of the county, and as incident to that power to receive payment before suit, and pay over the moneys so received to the county. This being so, I think that the legislation by which it was made his duty to collect taxes due the county by suit, and, as incident thereto, to receive them for the county before suit, if offered, was germane to his duties under the law at the time the bond was executed. For this reason such legislation did not confer such new duties as would relieve his bondsmen of responsibility in regard thereto. The judgment should be affirmed.

OFFICERS—INCREASING COMPENSATION.—Where an office is created by the constitution the compensation can neither be increased nor diminished during the term: *Douglass County v. Timme*, 32 Neb. 272. Where the constitution prohibits the increase of compensation of an officer during his term, the fact that the office was created by statute would make no difference: *County of Cook v. Sennott*, 136 Ill. 314; but, in the absence of a constitutional prohibition or an affirmative provision fixing the compensation of an officer, the legislature may change such compensation: *Douglass County v. Timme*, 32 Neb. 273. See, also, the extended note to *Hoke v. Henderson*, 25 Am. Dec. 703.

OFFICIAL BONDS—INCREASE OF DUTIES, WHETHER DISCHARGES SURETIES.—Sureties upon the bond of a public officer are not discharged by the imposition upon the principals, by the legislature, of further duties and obligations of a nature and character similar to those already taken: *People v. Vilas*, 36 N. Y. 459; 93 Am. Dec. 520, and extended note. See, also, the extended notes to *Pratt v. Wright*, 67 Am. Dec. 771, and *Commonwealth v. Cole*, 46 Am. Dec. 509.

HOWARD v. McNAUGHT.

[9 WASHINGTON, 355.]

JUDGMENT—MERGER.—Judgment foreclosing a mortgage without personal service on the mortgagor does not merge the cause of action if the full amount of the mortgage debt is not realized from the foreclosure sale. The mortgagee may maintain a personal action against the mortgagor to recover the amount yet remaining due.

MORTGAGES—FORECLOSURE—RECOVERY OF BALANCE DUE—EVIDENCE.—In an action to recover a balance due on the mortgage debt after foreclosure and sale of the mortgaged premises, evidence as to the value of the land is immaterial and inadmissible in the absence of an allegation of fraud by reason of which the mortgaged land has been sold for less than its value.

D. M. Woodbury and Wells & Joiner, for the appellants.

Million & Houser, for the respondent.

355 HORT, J. This action was brought to recover an amount alleged to be due upon a certain bond. The appellants claimed there was nothing due thereon, for the reason that the debt evidenced by it had been reduced to 356 judgment in the district court of Harper county, Kansas. It appeared that there had been a foreclosure of a real estate mortgage, which had been given to secure the payment of the bond in question, and that certain moneys had been realized upon a sale of the mortgaged property, and applied upon the amount due upon the bond, leaving a balance of seven hundred and fifty-six dollars, for which this action was

brought. It further appeared that in such foreclosure suit there was no personal service upon the appellants, that they were nonresidents of the state, and never appeared therein.

The alleged errors of the trial court are argued under several heads, but the material question involved in the entire discussion is as to whether or not, under the circumstances above stated, there was such a merger of the original cause of action that no suit could be maintained thereon here. If there was such a merger, then the rulings of the trial court were clearly erroneous, and the judgment should be reversed. If there was no such merger then the judgment should be affirmed. That a cause of action is merged in a judgment rendered thereon may be stated as a general rule, and it is because of this rule, and of the fact that it is applied as well in the case of foreign as domestic judgments, that the appellants contend that this action could not be maintained. But to this general rule there are well-recognized exceptions or limitations, and one of these is that it is a merger only so far as the judgment determined, or might have determined, the rights of the parties. From which it will follow that the judgment in the state of Kansas was only a merger of the cause of action upon the bond so far as the enforcement thereof against the real estate was concerned. The judgment was only binding to that extent, and had no force against the appellants personally or their property not covered by said mortgage. The rights of the appellants to make any defense that they might have to said bond ³⁵⁷ were in no manner concluded by such judgment. Hence, under the exception or limitation above stated, there was no merger of the right to maintain a personal action against these defendants upon the original undertaking: See 15 Am. & Eng. Ency. of Law, sec. C, p. 340; *McVicker v. Beedy*, 31 Me. 314; 50 Am. Dec. 666; *Middlesex Bank v. Butman*, 29 Me. 19. Of course the amount of the bond could be collected but once, and to the extent that money was realized in the proceeding in Kansas it would constitute a payment of the undertaking, and only the balance could be recovered here, and that is all that was sought in this action.

The appellants attempted to prove the value of the land against which the foreclosure proceedings were had, and alleged error because they were not allowed to do so, but, in the absence of an allegation of fraud by reason of which the land had been sold for less than its value, it was immaterial

whether it was worth more or less than the amount obtained for it.

The judgment will be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

MORTGAGES—FORECLOSURE—JUDGMENT FOR DEFICIENCY.—If a judgment has been entered against a nonresident foreclosing a mortgage, such judgment being based on constructive service of process, an action may be maintained against the defendant to recover the amount of the deficiency remaining after such sale: *Blumberg v. Birch*, 99 Cal. 416; 37 Am. St. Rep. 67. A balance due after the foreclosure of a mortgage in equity may be recovered at law by a suit on the bond: *Globe Ins. Co. v. Lansing*, 5 Cow. 380; 15 Am. Dec. 474. A mortgagee may have in a foreclosure suit a decree for the deficiency against the grantee of the mortgagor, where the grantee has covenanted in his deed from the mortgagor to pay off the mortgage: *Klapworth v. Dressler*, 13 N. J. Eq. 62; 78 Am. Dec. 69. Where equity has power to enforce a mortgage, and a sale is ordered, a decree *in personam* will be entered for any balance that remains due: *January v. January*, 7 T. B. Mon. 542; 18 Am. Dec. 211. In an action for the foreclosure of a mortgage no personal judgment for any part of the debt can be rendered against the mortgagor on his bond until after the sale, and then only for the deficiency reported to be unpaid: *Hull v. Young*, 29 S. O. 64. Where mortgaged premises are all sold to satisfy a first installment due upon the mortgage the court cannot enter up a personal judgment against the mortgagor for a subsequent installment when it becomes due: *Bliss v. Weil*, 14 Wis. 35; 80 Am. Dec. 766, and note.

LOVELL v. HOUSE OF THE GOOD SHEPHERD.

[9 WASHINGTON, 419.]

PARENT AND CHILD—RIGHT TO CUSTODY.—A charitable corporation having no legal right to the custody of a minor child cannot retain such custody as against its parents, no matter whether they are proper custodians or not.

PARENT AND CHILD—RIGHT OF PARENT TO CUSTODY.—Before parents can be deprived of the custody or comfort of their minor child a case must be made which is sufficiently extravagant, singular, and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing.

PARENT AND CHILD—RIGHT OF PARENT TO CUSTODY.—The fact that the mother of a minor child is a passionate, coarse, vulgar, and pugnacious woman, and that the father is addicted to the excessive use of intoxicants, and has other debasing habits, is not sufficient to deprive them of the custody of the child.

PARENT AND CHILD—RIGHT TO CUSTODY—ESTOPPEL.—If a charitable corporation has no legal right to the custody of children placed in its charge a mother who has placed her minor child in charge of such institution, under a promise that the child should remain there until eighteen years of age, is not estopped to assert her right to the custody and control of the child at any time before it arrives at such age.

Hays & Humphrey, for the appellant.

John Fairfield and Daniel T. Cross, for the respondent.

⁴²⁰ DUNBAR, C. J. This case is brought to this court on appeal from an order of the superior court of King county, to reverse and set aside the order of the judge of that court, sitting in equity, dismissing a writ of habeas corpus heretofore brought, and remanding the child, Maggie McGee, otherwise called Maggie Lovell, to the care of the respondent, House of the Good Shepherd, until the further order of the judge of the superior court of King county. About three years before the bringing of this action said Maggie Lovell was left by her then widowed mother with the respondent on an indefinite oral agreement. Soon after the mother demanded the child, but the respondent refused to give her up, and has ever since held her. On the seventeenth day of May, 1893, the appellants, Maggie Lovell's mother and stepfather, duly adopted the said Maggie by order of the superior court of Pierce county, Washington. After the adoption of said child, and before the bringing of this action, her custody was demanded by the appellants, but respondent refused to give her into their possession.

Respondent is a corporation established, among other things, to care for and educate orphans and deserted children. The institution is incorporated under the laws of the state of Washington, and is conducted by the sisters of the Roman Catholic faith, who devote their lives to this work.

It is alleged by the appellant that the court erred in permitting any evidence tending to show that appellant John Lovell was not a fit and proper person to have the care and custody of the child, because such evidence, if proper, ⁴²¹ should have been pleaded, and there was nothing in the pleadings to put the competency of the said Lovell in issue. Respondent insisted that in proceedings of this character courts are not restricted to the same stringent rules of evidence which govern them in trials by jury; that the exact truth should be sought out by all practicable means, and mere technicalities should be discountenanced and set aside. This is true in any case, and technicalities under our code which tend to prevent the meritorious adjudication of the case are not favored. But the object of rules of pleading is to elicit the exact truth, and it seems to us that no litigant

can safely go to trial without knowing substantially the issues that are involved; and if he is not informed by the pleadings it becomes something more than a mere technical omission which should be disregarded; but the court, by compelling him to submit his cause on such pleadings and without such information being furnished him, deprives him of a substantial right. Whether, however, we would reverse this case on this ground alone we will not now decide, for it seems to us that on the merits of the case there was no showing made by the respondent, or any attempt to show any legal right which it had to the custody of the minor child; and, if it had no legal right to the custody of the child, it matters not whether the parents were competent custodians or not, so far as the respondent is concerned: *Church on Habeas Corpus*, 1st ed., sec. 454, p. 591; *Bustamento v. Analla*, 1 N. M. 255. Under such circumstances the possession should be taken from it; and if, upon a proper petition, the appellants are found by the court to be incompetent a proper guardian should be appointed to take control of the custody and education of the minor. This the law provides for, but it nowhere provides—nor would such a provision be practicable—for the appointing of a corporation as the guardian of a minor child. This being true, ⁴²² there is no foundation for the claim of the respondent, and the writ should have been enforced.

We have carefully examined the testimony in this case, and are not satisfied that such a showing is made out against the parents as ought to deprive them of the custody of their child. While it is true that the welfare of the child should be the first consideration of the court, yet the right of the parent is not to be disregarded, and it is assuming a grave responsibility to deprive parents of the care, control, custody, and education of their children because they do not come up to the standard of perfection that we have established for our own action in that respect. There is, perhaps, scarcely a day but that children may be seen who, in the ordinary estimation, are neglected, and of whom the popular verdict would declare that they would be better off and stand a better chance of becoming useful members of society if they were removed from the pernicious influence of their parents. Yet it would not do for that reason to interfere with the domestic relations, or to set up our particular standard for the guidance of families in general. There is such a diversity of religious and social opinion and of social standing and of in-

tellectual development and of moral responsibility in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people without regard to religious belief or social standing before a parent should be deprived of the comfort or custody of a child. It is doubtful, in our minds, if such a case is made out here. It is true that the appellant, Mrs. Lovell, has not been the most exemplary mother; that the care of her children has not been of that kind which would commend itself to many mothers; that she is a passionate woman with an uncontrollable ⁴²³ temper, coarse, vulgar, and pugnacious, is evident from the record; but if every coarse, vulgar, and passionate woman were deprived of the custody of her children our orphan asylums would be filled to overflowing; and if every man who is given to brutalizing himself by the excessive use of intoxicants, and by other debasing habits, were to be deprived of the custody of his children the said institutions would be found altogether inadequate.

Even immorality of the mother is not always a sufficient reason for depriving her of the custody of her child. It is the universal holding of the courts, and in many states is made a provision of the statute, that the mother of an illegitimate child, in the absence of special reasons, is entitled to its custody, and of course the fact of its illegitimacy is proof of the mother's immorality. The maternal instinct can generally be relied upon to protect the child far better than strangers who act simply from a cold and unsympathetic feeling of duty to society. Of course, when it becomes apparent that nature's appeal to the parental heart meets with no response, and a parent has become so brutalized and lost to the promptings of nature that she is willing to sacrifice either the physical or moral well-being of her children to the gratification of her own debased propensities or vicious habits, it becomes the imperative duty of the court to reach forth its hand for the protection of the children. But, as we have before said, we do not think the result in this case shows a necessity for judicial interference; and, even though it may appear that three years ago the mother was not a competent person to maintain control of this child, the difficulties then

alleged to exist have now passed away. Hence the necessity of separating the mother and child has ceased to exist.

It is also claimed by respondent, that, when the mother placed the child in this institution, she promised that she should remain there until she was eighteen years old, and ⁴²⁴ that for that reason she is now estopped from demanding her custody. There are some cases which hold, that, where a child of tender years is given by a parent to another person, the parent cannot afterward assert his right to the control and custody of the child. But this rule is founded on the tender and humane idea that by reason of the long and intimate intercourse between the child and the foster parent a reciprocal affection has sprung up which ought to be respected, and which it would be cruel and heartless to interfere with by a forced separation. But no such principle can apply here. The respondent in this case is a corporation; it is controlled and its business is done by officers who are constantly changing—at least, who may be constantly changing. It is a universally accepted proposition that a corporation has no soul. It is not disturbed in any of its operations by sentiment, and cannot, therefore, be allowed to plead a sentimental wrong.

Under all the circumstances of the case we think that the writ should have been sustained. The judgment will, therefore, be reversed, and the cause remanded with instructions to award the custody of the said Maggie Lovell to the appellants.

STILES and ANDERS, JJ., concur.

HOYT and SCOTT, JJ., concur in the result.

PARENT AND CHILD—RIGHT OF PARENTS TO CUSTODY OF MINOR CHILD.— It is the strict legal right of the parents and those standing *in loco parentis* to have the custody of their infant children as against strangers; but the court will not regard this as controlling when it would imperil the personal safety, morals, health, or happiness of a child: *Richard v. Collins*, 45 N. J. Eq. 283; 14 Am. St. Rep. 726, and note. A father is *prima facie* entitled to the control of his minor child, and before this right can be taken away the reasons for doing so must be obvious and satisfactory, and established beyond doubt: *Miller v. Wallace*, 76 Ga. 479; 2 Am. St. Rep. 48, and note. When a father is a suitable person he is entitled to the custody of his minor child, but, if a sufficient reason exists why he should not have its custody, it will be given to others better fitted: *Brooke v. Logan*, 112 Ind. 183; 2 Am. St. Rep. 177, and extended note. For a further discussion of this question, see the recent cases of *Cunningham v. Barnes*, 37 W. Va. 746; 38 Am. St. Rep. 57, and note; and *Marshall v. Reams*, 32 Fla. 499; 37 Am. St. Rep. 118, and note.

McKENZIE v. PUGET SOUND NATIONAL BANK.

[9 WASHINGTON, 442.]

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.—An agreement by a creditor to forbear the enforcement of his debt is not a sufficient consideration to support an oral promise of a third person to pay that debt, although such third person makes the promise for the purpose of subserving and promoting his own pecuniary interests.

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.—A consideration to support an oral promise to pay the debt of another to be valid must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt.

Strudwick & Peters, for the appellant.

Carr & Preston and W. R. Bell, for the respondent.

443 SCOTT, J. The material allegations of the complaint in this case are, that, on the first day of August, 1890, one Almond was indebted to the plaintiff in the sum of fourteen hundred and twenty-five dollars, and that said Almond, doing business under the name of Almond & Phillips Foundry Company, was indebted to 444 defendant in the sum of fourteen thousand dollars, and that said Almond was then the owner and in possession of a certain leasehold interest in and to certain premises described, and was the owner of a certain foundry and machine-shop plant of the value of thirty thousand dollars. The fifth and sixth paragraphs of the complaint are as follows:

“5. That on the twenty-first day of August, 1890, the said Charles H. Almond, doing business as aforesaid, conveyed to one Jacob Furth, the cashier and manager of the defendant, for the use and benefit of defendant, all of said plant, property, stock on hand, lease, and accounts, and the defendant accepted the same and went into the possession thereof, through one G. L. Faust, who became and was appointed by defendants its general agent and manager in that behalf.”

“6. That said defendant took and accepted said conveyance and assignment, and entered into the possession of said property, with a view and intention of paying off and discharging all the debts of said C. H. Almond, for the purpose of subserving and promoting its own pecuniary and business interests; and said defendant proposed, for the purpose afore-

said, to the plaintiff and others of the creditors of said C. H. Almond, that if said creditors would forbear the collection of their said debts against said C. H. Almond, and would accept payment thereof from defendant in deferred installments, that defendant would pay off and discharge said debts, and plaintiff and others of said creditors of said C. H. Almond accepted said proposition of defendant and forbore the collection of their said debts."

The court sustained a demurrer to the complaint, and plaintiff appealed.

We are of the opinion that the demurrer was well taken, on the ground that the promise alleged was void under the statute of frauds, it being conceded that it was not in writing. A logical construction of the complaint is that Almond transferred said property to the defendant in consequence of his indebtedness to the defendant, and that the ⁴⁴⁵ promise made by defendant to plaintiff was made after the execution of said conveyance and delivery of the possession of the property, and was no part of the consideration for said transfer.

The great weight of authority, certainly, is to the effect that the agreement of a creditor to forbear the enforcement of his debt is not a sufficient consideration to support an oral promise of a third person to pay that debt, and this is not disputed by the appellant; but he contends that the promise was made for the purpose of subserving and promoting respondent's own pecuniary business interests. The most favorable construction that can be put upon the allegations of the complaint in this respect is, that defendant was of the opinion that the payment of Almond's indebtedness to the plaintiff would subserve the defendant's interests. That the defendant had an idea that such payment would benefit it in some way, although what it was founded upon is not apparent. Yet this was not the consideration for the promise, nor any part of it. The bank already had the property, and had made no promise to pay the plaintiff's debt to obtain it. The obligation, if any, upon the part of the defendant to pay the plaintiff's claim arose only upon its promise made to the plaintiff. The consideration for said promise was the forbearance of the plaintiff to proceed against Almond. The promise would have been sufficient to sustain the action were it not for the statute. Any promise to pay, whether in writing or not, must be founded upon a consid-

eration to be binding. A consideration to support a promise, not in writing, to pay the debt of another must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt: *Ackley v. Parmenter*, 98 N. Y. 425; 50 Am. Rep. 693; *Cross v. Richardson*, 30 Vt. 641. Almond's debt to the plaintiff was not discharged by this promise, but remained in force.

Affirmed.

STILES, ANDERS, and HOYT, JJ., concurred.

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—FORBEARANCE AS CONSIDERATION.—A verbal promise to pay the debt of another, given in consideration of a forbearance to attach the property of the debtor, to which neither the promisor nor the creditor has any right, lien, or title, is void under the statute of frauds: *Stewart v. Jerome*, 71 Mich. 201; 16 Am. St. Rep. 252, and note. An oral promise by a third person to pay accruing rent, if the landlord will forbear the eviction of the tenant for a certain period, is within the statute of frauds, and void as a mere promise to pay the debt of the tenant: *Riegelman v. Focht*, 141 Pa. St. 380; 23 Am. St. Rep. 293, and note; and so is a promise to pay the debt of another in consideration of the plaintiff's forbearing to proceed on his execution: *Durham v. Arledge*, 1 Strob. 5; 47 Am. Dec. 544, and note; and likewise with a promise to pay a judgment against another if the creditor would extend a certain forbearance to the debtor: *Allhouse v. Ramsey*, 6 Whart. 331; 37 Am. Dec. 417.

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER—SUFFICIENCY OF CONSIDERATION.—If the leading object of a party who promises to pay the debt of another is to promote his own interests, such promise, if made on a sufficient consideration, is valid, though not in writing: *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571, and note. A verbal promise to pay the debt of another is within the statute of frauds, unless it is in effect substituted for the original liability: *Brant v. Johnson*, 46 Kan. 389. This subject is fully discussed in the extended note to *Packer v. Benton*, 95 Am. Dec. 251.

ALLEN v. HIGGINS.

[9 WASHINGTON, 446.]

EJECTMENT—PLEADING—PRIMA FACIE CASE.—Under a statute requiring the defendant in ejectment to plead the estate or license, under which he holds possession, an answer by way of general denial creates no issue under which evidence of his title is admissible, and, if the plaintiff pleads and proves any legal title to the premises, he thereby establishes a *prima facie* case.

COTENANCY—EJECTMENT AGAINST STRANGER.—A tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover such possession in an action of ejectment brought against a stranger to the common title.

John P. Judson, for the appellant.

B. Sheeks and C. H. Dillon, for the respondent.

446 DUNBAR, C. J. This is an action of ejectment. The complaint alleged that the plaintiffs were the owners, seised in fee and entitled to the possession of the tract of land in dispute; that while they were such owners, and so seised and possessed, and entitled to the possession, defendant, without right, entered into and upon the same, thereby ousting and ejecting plaintiffs therefrom, and continued to 447 withhold possession therefrom; alleged the damages, value of the rents, profits, etc. The answer was a general denial. The plaintiffs claimed title from two sources, one as the successors of the interest of George Luviney, and the other by conveyance from the "Workingmen's Joint Stock Association." Defendant did not offer any evidence. The question therefore, is, Did plaintiffs make a *prima facie* case?

Appellant contends that a general denial puts in issue every material allegation contained in the complaint, and that under such denial plaintiffs must prove every fact essential to recovery, and defendant may prove any facts which defeat plaintiffs' right to recover. Under the provisions of our Code of Procedure, section 532, in an ejectment proceeding, "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer"; and "if so pleaded, the nature and duration of such estate, or license, or right to the possession shall be set forth with the certainty and particularity required in a complaint." Consequently, the testimony offered in this case was inadmissible under the pleadings in this

case by defendant to defeat the rights of the plaintiffs. The defendant in this action, then, so far as the pleading or the proof is concerned, was a trespasser without any right whatever, and if plaintiffs had any legal right at all it was a superior right.

It had been decreed by the probate court that the premises described in the complaint escheated to the state. This decision of the probate court was set aside by the superior court of the state. Afterward partition proceedings were instituted in the United States circuit court, the result of which, it seems to us, was to settle this case in favor of the respondents' contention. In that proceeding the respondent Allen, three of the original grantees, D. B. ⁴⁴⁸ Hannah, administrator of the estate of George Luviney, deceased, and all persons claiming as purchasers from the fourteen grantors were made parties, and even if there was a break in the title of the grantors all the parties in interest were before the United States court, and were bound by the decree which was made whereby the property was partitioned between the tenants in common, and whereby the Luviney interest was set off and decreed to respondent Allen. And we think the contention of the respondents is correct, that, even if all the parties were not before the court, still there were three of them, and the plaintiff Allen became by said decree a tenant in common with said grantees. If this be true, then a tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover the possession of all such land in an action of ejectment brought against a stranger to the common title: *Freeman on Cotenancy and Partition*, 2d ed., sec. 343; *Touchar d v. Crow*, 20 Cal. 150; 81 Am. Dec. 108; *Williams v. Sutton*, 43 Cal. 65.

The proceeding against the state in which the title was decreed to be in the respondent Allen was a proceeding *in rem*, and the decree, being *in rem*, was conclusive and binding upon the defendant: *Ryan v. Fergusson*, 3 Wash. 356.

The judgment will be affirmed.

ANDERS, SCOTT, HOYT, and STILES, JJ., concur.

EJECTMENT—THE PLEA OR ANSWER.—In ejectment the defendant need not set up title in himself: it is involved in his denial of plaintiff's right. But, if he wishes to avail himself of facts not amounting to such denial, he must plead them: *Nelson v. Brodhack*, 44 Mo. 596; 100 Am. Dec. 328. Facts sufficient to compel a conveyance of the patentee's title held in trust for

another, and relied upon as a defense in ejectment, must be set up in the answer: *Curman v. Johnson*, 20 Mo. 108; 61 Am. Dec. 593. General issue only can be pleaded in ejectment under the Illinois Revised Statutes, but the same matter may be given in evidence thereunder as in the common-law action of ejectment, except proofs of certain fictitious matters which are abolished: *Warren v. President etc.*, 15 Ill. 236; 58 Am. Dec. 610. The general issue in ejectment puts plaintiff on proof of a valid legal title; otherwise the defendant's possession is *prima facie* evidence of title in him: *Pratt v. Phillips*, 1 Sneed, 543; 60 Am. Dec. 162. In ejectment, where the answer contains a simple denial of the allegations in the complaint, the defendants cannot introduce in evidence the copy of the record of a former recovery: *Piercy v. Sabin*, 10 Cal. 22; 70 Am. Dec. 692.

COTENANCY.—EJECTMENT BY ONE COTENANT against the holder of an adverse title or trespasser, to recover the whole property without joining his cotenants: See *King v. Hyatt*, 51 Kan. 504; 37 Am. St. Rep. 304, and note, with the cases collected.

MARX v. PARKER.

[9 WASHINGTON, 473.]

GARNISHMENT — INTERVENTION. — Although a bank summoned as a garnishee sets up that it has an account with the judgment debtor as a depositor, but that the money thus on deposit belongs to a city having been collected by the judgment defendant in his official capacity as marshal of such city, and held by the bank as such, it is error for the court, of its own motion, to require the city to appear as an intervenor.

GARNISHMENT—WHEN NOT MAINTAINABLE.—A plaintiff in garnishment can obtain no greater beneficial relief against the garnishee than the judgment debtor is entitled to; and, if the debtor's recovery is limited to a mere legal title, without beneficial interest or right of enjoyment in himself, the proceeding must fail.

GARNISHMENT OF TRUST FUNDS.—A judgment creditor cannot have his debt satisfied out of property held in trust for another, no matter how completely his debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given.

GARNISHMENT OF TRUST FUNDS.—Moneys belonging in equity to a city, but deposited in bank by one of the city's officers in his individual name, cannot be garnished in a suit against him by his individual creditors.

GARNISHMENT OF TRUST FUNDS. — A public officer of a city, though required to give bond for the proper payment of moneys coming into his hands officially, is a bailee and not a mere debtor of the city, and, although he deposits such moneys in bank in his individual name, they cannot be garnished at the suit of his individual creditors.

A. Sherman and Kerr & McCord, for the appellants.

Alexander & Alexander, for the respondents.

474 STILES, J. Marx & Jorgenson having obtained a judgment for money against W. S. Parker, summoned the First

National Bank of Fairhaven as a garnishee. The bank answered that it had an account with Parker as a depositor, wherein he was credited with eight hundred and forty-five dollars and fourteen cents; but it alleged that the money deposited was money of the city of Fairhaven, which Parker, as marshal of that city, had collected in his official capacity, and this fact, at the hearing, it established to a moral certainty. The account was kept in the individual name of Parker, but it was understood that none but city money would be deposited in that account, and that none but checks in favor of the city treasurer would be drawn against it. Still, it was in no sense a special deposit, but the money was used by the bank for its own purposes, with the understanding that it would be required at the expiration of each month, when the statute required the marshal to settle with the treasurer: Gen. Stats., sec. 655.

It was error for the court, of its own motion, to require the city of Fairhaven to appear as an intervenor. It would have neither gained nor lost by the result of the proceeding: *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569.

It was a proper case for an interpleader on the motion of the bank under the Code of Procedure, section 152; but no such motion was made. Therefore the city must go out of the case, in any event.

⁴⁷⁵ The disposition of this case depends upon the settlement of two questions: 1. What were the rights of respondents as plaintiffs in the garnishment proceeding? 2. What relation did Parker, as marshal, bear to the city of Fairhaven touching the money collected by him and deposited with the bank?

1. It is a general rule in garnishment that the plaintiff can obtain no greater beneficial relief against the garnishee than the judgment debtor would be entitled to, and that, if the debtor's recovery would be limited to a mere legal title, without beneficial interest or right of enjoyment in himself, the proceeding must fail. A judgment creditor cannot have his debt satisfied out of property held in trust for another, no matter how completely his debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given: *Wade on Attachment*, sec. 416; *Morrill v. Raymond*, 28 Kan. 415; 42 Am. Rep. 167; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215.

Therefore, if the deposit in the bank was, in equity, the

property of the city, although it stood in Parker's name, respondents had no right to a judgment against the garnishee.

2. The respondents present several propositions, supported by authority, to the effect that a custodian of public funds, who is required by law to give a bond for the proper disposition of the moneys coming to his hands, is not a mere bailee, but is a debtor; and the argument is drawn therefrom that the money which he receives is his, and can be applied to the payment of his debts.

The general rule is conceded to be that an agent can, under no circumstances, so deal with his principal's property or money that the former cannot, as against him, follow and recover it or its proceeds, whatever shape he may have caused it to take. And all persons into whose ⁴⁷⁶ hands the principal's property, or its proceeds, may come, with notice of its character, are likewise responsible to him in a proper action: *National Bank v. Insurance Co.*, 104 U. S. 54; *Farmers' etc. Bank v. King*, 57 Pa. St. 202; 98 Am. Dec. 215; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Overseers of Poor v. Bank of Virginia*, 2 Gratt. 544; 44 Am. Dec. 899; *Meadowcroft v. Agnew*, 89 Ill. 472.

Now, a collector or treasurer of a municipal corporation, without bond and without statutory obligations, would at common law be a mere bailee, and the rules governing bailments would apply to him the same as any other agent. But it is universal that such officers are required to give bonds, and that statutes govern their liability, and out of this fact have grown many cases which seem at first glance to sustain the view that they are debtors and not bailees, and that the money they receive is their own.

In *Inhabitants of Colerain v. Bell*, 9 Met. 499, it was said: "The specific money received by a collector, in the collection of taxes, is his money, and not that of the town."

In *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112, 59 Am. Dec. 171, the court, speaking of a collector of taxes, said: "His obligation is not regulated by the law of bailments, and the cases cited to that effect are not applicable. He is a debtor, an accountant."

In *Egremont v. Benjamin*, 125 Mass. 15, concerning a town treasurer, the expression was used: "He was not a bailee of the moneys received, but an accountant."

Halbert v. State, 22 Ind. 125, declared it to be well estab-

lished that a public officer required to give bond for the proper payment of moneys coming into his hands officially, is not a mere bailee of the money. *Rock v. Stinger*, 36 Ind. 346, held that the technical legal title to ⁴⁷⁷ money in the hands of a township trustee was in himself, and that a loan of such money did not constitute an illegal transaction; and so, in *Shelton v. State*, 53 Ind. 331, 21 Am. Rep. 197, it was ruled that there could be no recovery against a county treasurer for interest received by him on deposits of county funds in a bank, because the money received by him became his own money. This case notes the absence of statutory provisions, which will be spoken of hereafter. *Perley v. County of Muskegon*, 32 Mich. 132, 20 Am. Rep. 637, contains an elaborate review of the subject in an action for money had and received against third persons alleged to have received and used money furnished by a county treasurer out of county moneys in his hands, and it was held that the officer was not a bailee merely, and that the action brought would not lie; yet the opinion strongly intimates that an action on the case or a bill in equity might be sustained. So far has the argument drawn from these cases been carried, that, in *State v. Keim*, 8 Neb. 63, it was held that the state could not recover money deposited by its treasurer in a bank, on the ground that it was a loan of money prohibited by statute, and not the result of a conspiracy to obtain public money; and in *First Nat. Bank v. Gandy*, 11 Neb. 431, a judgment creditor of a county treasurer was awarded judgment against a bank, as garnishee, of funds deposited with it by the officer as treasurer. The statute made it a crime for the treasurer to loan public money, and the bank was held to be estopped to set up the fact that it had assisted in the accomplishment of the forbidden act.

A leading case on this subject is *United States v. Prescott*, 3 How. 578, where it was said in an action on the bond of a receiver of public moneys: "This is not a case of bailment, and, consequently, the law of bailment does not apply to it. The liability of the defendant arises out of his official bond, and principles which are founded upon public policy."

⁴⁷⁸ The case last cited was followed in *United States v. Morgan*, 11 How. 154, and *United States v. Dashiell*, 4 Wall. 182. But *United States v. Thomas*, 15 Wall. 837, cleared the atmosphere surrounding the point in discussion to a very great extent. The decision in that case, reviewing the former

federal cases, held that a collector of the government was a bailee, but that the policy of the acts of Congress had exacted from him a more strict accountability than the common law imposed upon the ordinary bailee. The opinion refers to acts of Congress restricting the authority of depositaries of public moneys, including prohibition against depositing in banks and declaring certain acts to constitute a crime. It finds the rule to be nearly absolute that the officer is responsible for government money; but it proceeds: "Still they are nothing but bailees. To call them any thing else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility."

It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a bailee or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have had no control. But in every such case it was held that his liability was absolute, and the true reason, under *United States v. Thomas*, 15 Wall. 337, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law. If the courts of the states adhered to ⁴⁷⁹ the view broadly stated in *Rock v. Stinger*, 36 Ind. 346, that the money in the hands of the county treasurer is his own money, how is it that the sole case which is cited that such money can be applied to the payment of his individual debts is found in Nebraska? Why do we not see creditors of such officers sending the sheriff into the very safe of the county treasurer and taking therefrom the money which belongs to the treasurer upon execution against him? Why are not army paymasters stopped on the road and required, by supplementary proceedings, to pay their debts out of the money in their hands for the payment of troops? No lawyer would think of such a proceeding for one moment, because the money in their hands belongs to the public and not to themselves; and, if the money in the hands of the officer is thus exempt, what can there be

in his depositing it in a bank, or loaning it to an individual, which changes his ownership of it, or of the debt created by his deposit or loan? Any principal whose agent converts or deposits or loans his money can continue to look to the agent and compel repayment by him as a debtor; but he is not bound to do so when the person receiving it has knowledge of the relations of the principal and agent. Nor is there any thing in the fact that states or municipal corporations require bonds which increase the certainty that their agents will faithfully account, which should deprive them of the common-law right of private principals in similar transactions.

Again, we have, in this state, laws which are fully equivalent to the acts of Congress referred to so restricting the authority of federal depositaries, with the exception that deposits in banks are not expressly forbidden; for section 57 of the Penal Code makes it a felony for any officer to use any portion of the public money intrusted to him, in any manner or for any purpose not authorized by law, which is the same as a prohibition against using it except as authorized by law. Under the Nebraska case cited it ⁴⁸⁰ was held that a deposit of such funds in a bank would be a breach of the bond of the officer, and a violation of a penal statute similar to ours. This may be correct, but we do not believe it to be logical to say that for that reason the equitable owner of the fund should not have it, or that the debtor bank should be estopped to defend in garnishment by disclosing such owner. The liability of the bank to the officer is a chose in action which, although the naked legal title to it is in him, really belongs to his principal. Some complications may grow out of this doctrine, as they certainly must out of any other; but it is not a new doctrine at all, and it will operate as well in practice where a municipal corporation is the principal as where he is a private individual or corporation: See Mechem on Public Offices, sec. 922, and cases cited.

Although garnishment is a purely statutory proceeding, it is always administered upon equitable principles, and upon the answer of the bank and the proofs we hold it not to be liable for respondent's judgment against Parker.

Judgment reversed, and cause remanded, with instructions to dismiss the garnishment proceeding. The First National Bank of Fairhaven will recover costs against respondents, but

not against the city of Fairhaven. The city of Fairhaven will not recover costs.

DUNBAR, C. J., and ANDERS, SCOTT, and HOYT, JJ., concur.

GARNISHMENT OF TRUST FUNDS.—Funds in the hands of a trustee in equity are not, as a general rule, liable to attachment until the share of the debtor has been ascertained by a statement of the trustee's trust, and the settlement of his final account: *Groome v. Lewis*, 23 Md. 137; 87 Am. Dec. 563, and note. Money held in a fiduciary capacity, but deposited by the holder to his general account in a bank, still belongs to the other party, and cannot be garnished or attached for the depositor's debt incurred before such deposit: *Morrill v. Raymond*, 28 Kan. 415; 42 Am. Rep. 167, and especially note. Funds in the hand of a trustee subject to the control of the court cannot be attached: *Cockey v. Leister*, 12 Md. 124; 71 Am. Dec. 588, and note. If a trust is valid, subsequent attachments will not affect the funds, and subsequent garnishee process could not, if applicable at all, gain any preference over the creditors who had precedent rights under the trust: *Keppel v. Moore*, 66 Mich. 292. See, further, the notes to the following cases: *Lightner v. Steinagel*, 85 Am. Dec. 295; and *King v. Moore*, 41 Am. Dec. 44.

OLSON v. VEAZIE.

[9 WASHINGTON, 481.]

JUDGMENTS AGAINST PARTNERS—DESIGNATION OF PARTIES.—A judgment describing the parties against whom it is rendered by their partnership name is valid, although in the action in which the judgment is rendered they are sued as individuals composing a partnership and as joint debtors, and designated by their individual names in the pleadings, including the caption to the judgment entry itself.

JUDGMENTS—ACTIONS UPON.—A party who has recovered a joint judgment upon a joint and several claim may thereafter maintain an action upon the judgment against either of the judgment debtors.

JUDGMENTS OF SISTER STATES—ACTIONS UPON—INTEREST.—In an action upon a judgment rendered in another state interest may be recovered thereon, although the judgment sued on does not of itself purport to bear interest, and there is no proof of a statute of such state authorizing the collection of interest on judgments rendered therein.

Stevens, Seymour & Sharpstein, for the appellant.

M. L. Clifford, for the respondent.

481 ANDERS, J. On October 13, 1884, the respondent, John Olson, commenced an action in the district court of the first judicial district, in and for the county of Washington, in the state of Minnesota, against the appellant, Orange Walker, and Samuel Judd, as partners doing business as Walker, Judd & Veazie, to recover the amount due on three promis-

sory notes made and delivered to respondent by said firm. On January 8, 1886, the following judgment was entered in that action: "It is hereby adjudged that the plaintiff herein recover of the defendants, Walker, Judd & Veazie, ⁴⁸² the sum of three thousand three hundred and fifty-five and $\frac{36}{100}$ dollars damages," etc. This judgment was never paid, and, subsequent to its rendition, the appellant, one of the defendants therein, removed to Pierce county in this state, where this action was instituted against him to recover the amount thereof with interest. The case was tried by a jury, and there was a verdict and judgment in favor of the plaintiff for the sum of five thousand and thirty-eight dollars and fifty cents, and the defendant appealed.

The first error assigned by the appellant as a ground for reversal of the judgment appealed from is that the judgment of the Minnesota court, upon which this action was based, is void, for the reason that it was rendered against a firm, as an entity, and, so far as the record discloses, in the absence of any statute of that state authorizing such a judgment. It is true, as claimed by appellant, that, "in the absence of a statute, partners can neither sue nor be sued in the partnership name": 2 Bates on Partnership, secs. 1018, 1049, 1059. But in this instance, the action was not waged against the defendants in the firm name. They were sued as individuals composing a partnership and as joint debtors, and were designated by their individual names in the pleadings and papers in the case, even including the caption to the judgment entry itself. Construing this judgment by the entire record, we think there can be no doubt that on its face it is a valid judgment against all of the individuals composing the firm of Walker, Judd, & Veazie.

In his valuable treatise on the Law of Judgments (sec. 50 a), Mr. Freeman says: "The name of the firm may be given, instead of the names of its individual members, or the parties may be designated generally as the plaintiffs or the defendants, provided a reference to the caption or to the pleadings, process, and proceedings in the action makes certain the names of the parties thus designated": See, also, 1 Black on Judgments, sec. 116; *Bolling v. Speller*, ⁴⁸² 96 Ala. 269; *Hendry v. Crandall*, 131 Ind. 42.

It is also urged on behalf of the appellant that if it be true that the action in the Minnesota court was an action against all the members of the firm of Walker, Judd & Veazie, and

that the court in that action obtained jurisdiction of each of them, still this action cannot be maintained against this appellant, for the reason that the respondent, having recovered a joint judgment upon a joint and several claim, cannot now sue the parties separately. In other words, it is insisted that the original cause of action is merged in the judgment, and, having obtained a joint judgment, the respondent thereby exhausted his election, and cannot now recover in a separate action. But, be that as it may, it is evident that the question of merger is not a material one in this case, for this action is founded upon the judgment of the Minnesota court, and not upon the original cause of action set forth in the complaint filed in that court by the respondent.

Whether the appellant appeared or was served with process in the action which culminated in a judgment against him in the court of Minnesota are questions upon which there is a marked conflict in the testimony, and the verdict of the jury will not, therefore, be disturbed on the ground that it is contrary to the evidence.

In making up the amount of their verdict the jury allowed interest, at the legal rate, upon the judgment sued on. There was no proof of a statute of Minnesota authorizing the collection of interest on judgments rendered in that state, and the judgment itself by its terms did not purport to bear interest. And the appellant therefore contends that the verdict is excessive, and ought to be set aside and a new trial granted. This contention is supported by the supreme court of California (*Cavender v. Guild*, 4 Cal. 253) and perhaps some others, but, in our ⁴⁸⁴ opinion, the better reason and the greater weight of authority are in favor of a contrary doctrine. In cases like this interest should be allowed from considerations of justice, as damages for the detention of money due, and such is the well-established rule in several of the states: *Barringer v. King*, 5 Gray, 9-12; *Hopkins v. Shepard*, 129 Mass. 600; *Sayre v. Austin*, 3 Wend. 496; *Mahurin v. Bickford*, 6 N. H. 567; *Stuart v. Hurt*, 88 Va. 343; *Shickle v. Watts*, 94 Mo. 410; *Wetherill v. Stillman*, 65 Pa. St. 105; *Ritchie v. Carpenter*, 2 Wash. 512; 26 Am. St. Rep. 877.

We perceive no error in the record, and the judgment is, therefore, affirmed.

DUNBAR, C. J., and STILES, SCOTT, and HOYT, JJ., concur.

JUDGMENTS OF SISTER STATES—ALLOWANCE OF INTEREST ON.—Interest on a judgment of another state should not be allowed where there is no evidence showing that the common law of such state has been altered by statute: *Thompson v. Monrow*, 2 Cal. 99; 56 Am. Dec. 318, and note. A judgment of another state against principal and surety, properly assigned to the surety, bears interest in his favor as called for by such judgment: *Turner v. Johnson*, 95 Mo. 431; 6 Am. St. Rep. 62.

COLE v. SATSOP RAILROAD COMPANY.

[9 WASHINGTON, 487.]

CORPORATIONS—STOCKHOLDERS—LIABILITY ON STOCK SUBSCRIPTIONS.—The fact that part of the stock of a corporation has been illegally subscribed by another corporation, all of the remaining subscribers for stock having taken with knowledge of that fact, and having paid part of their subscription to enable the corporation to commence business, cannot be successfully asserted by them to escape liability on their stock subscriptions in an action against them by the creditors of the corporation.

CORPORATIONS—STOCKHOLDERS—LIABILITY FOR STOCK SUBSCRIPTIONS MADE BY THEM THROUGH TRUSTEES.—Under a complaint alleging that stock in a corporation has been subscribed for by a party as "trustee," who, in making such subscriptions, has acted as agent for certain subscribers at their request, and for the benefit of each of them in proportion to his individual subscription, the creditors of the corporation may maintain an action against the real parties in interest to recover the amount of their subscriptions, and, without alleging fraud, may show by parol evidence that the subscription is in fact other than what upon its face it appears to be.

CORPORATIONS—INSOLVENCY—RIGHT OF RECEIVER TO SUE FOR STOCK SUBSCRIPTIONS.—A receiver for an insolvent corporation, appointed at the instance of its creditors, is clothed with all their rights, and may sue to recover stock subscriptions although the corporation could not maintain such suit.

Donworth & Howe, T. Carroll, and Dunning, Richards, Murray & Pratt, for the appellant.

Parsons, Corell & Parsons, for the respondents.

498 STILES, J. The complaint in this case, to which a demurrer was sustained, alleged:

1. The incorporation of the Pacific Mill Company under the laws of Washington, with a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each.

2. The incorporation of the Satsop Railroad Company under the laws of Washington, with a capital of \$100,000, and having by its articles of incorporation authority to subscribe for and acquire stock in other corporations.

3. That the defendants subscribed for the entire capital stock of the Pacific Mill Company, as follows: Satsop Railroad Company for 198 shares; C. F. White, as trustee, for 4,300 shares; and other individuals for 502 shares.

4. That said subscription of said C. F. White, as trustee, for said 4,300 shares of the capital stock of the Pacific Mill Company was made by the said C. F. White, as trustee and agent, for the benefit of all of the shareholders of said Pacific Mill Company at the request of said shareholders, and upon the express agreement between all of said shareholders that the said subscription was made by said C. F. White in trust for all the shareholders of said company, each of said shareholders to have an interest therein in proportion to the number of shares subscribed for by each subscriber in the individual name of such subscriber, and said subscription so made by said C. F. White, as trustee and agent for said shareholders, was so made in consideration of the mutual promises made to the others ⁴⁸⁹ by each of said shareholders, and in consideration of the benefits to be derived from being members of said corporation.

5. That the said subscription made by said C. F. White, as trustee and agent for said shareholders, was, after the making thereof, ratified and confirmed by said shareholders, and held and used for their benefit, and was ratified and accepted by the Pacific Mill Company aforesaid as the subscription of said shareholders.

6. That the subscriptions made to the capital stock of said Pacific Mill Company by the said defendants, and each of them individually, and by their agent and trustee, the said C. F. White, were made with full knowledge of the subscription of the Satsop Railroad Company for 198 shares of the capital stock of said Pacific Mill Company.

7. That the Pacific Mill Company had commenced business, incurred a large indebtedness, and become insolvent.

8. That the individual interests of the defendants in the subscription of C. F. White, as trustee, were as set forth.

9. That no part of the subscription of C. F. White, as trustee, had been paid except the sum of \$25,000, by the Satsop Railroad Company, and the amounts owing thereon and unpaid were as set forth.

10 *et seq.* That C. T. Le Ballister & Co. had recovered a judgment against the Pacific Mill Company for \$5,021.48 and costs; that an execution issued was returned *nulla bona*; that

Le Ballister & Co. had commenced an action in behalf of themselves and all other creditors who should join them, for the appointment of a receiver and other relief; that the Pacific Mill Company had been adjudged insolvent; that plaintiff had been appointed receiver; that proof of claims had been taken to the amount of \$65,000; that the receiver had demanded of the board of trustees of the Pacific Mill Company that it levy an assessment upon the unpaid subscriptions to the stock of the company to an amount sufficient to pay said indebtedness, which had been refused; that the court, upon the application of the receiver, ordered a levy of fourteen per cent on the said subscriptions, and authorized the receiver to bring suit therefor; that each of the defendants was notified of said assessment and called upon to pay the same in the sums set forth, but ⁴⁹⁰ each had failed and refused; and that the Pacific Mill Company was insolvent and had no assets whatever, except the stock subscriptions sued for.

Judgment was prayed accordingly.

From the briefs we are assured that the action of the court below was based upon *Denny Hotel Co. v. Schram*, 6 Wash. 134; 36 Am. St. Rep. 130. If so, we think the court overlooked many manifest differences between that case and this, as disclosed by the complaint which we have set forth with much fullness. It is true that the Satsop Railroad Company was a large subscriber to the capital stock of the Pacific Mill Company; and it is also true that under the decision in Schram's case it was not liable for any of its subscription although it assumed to authorize itself to make the subscription by its articles of incorporation, and that without its subscription the capital of the Pacific Mill Company was not all subscribed for; that it was not authorized to commence business, and that subscribers sued under the same circumstances as Schram would not be liable.

The action against Schram was the ordinary one of a corporation against one of its stock subscribers for the amount of his subscription, and nothing was there considered except the bare legal propositions arising out of the relations of the plaintiff and defendant on the facts. But in the case before us it is pointedly alleged that each of the subscribers had full knowledge of the subscription made by the Satsop Railroad Company, and that each of them paid his individual subscription, the subscription of White as trustee being the only one not paid. Such knowledge and action have fre-

quently been held to constitute a waiver of the right of the subscriber to insist on a full subscription: *Thompson's Liability of Stockholders*, sec. 120; *Morawetz on Private Corporations*, sec. 156, and cases cited; *Hager v. Cleveland*, 36 Md. 476; *Morrison v. Dorsey*, 48 Md. 468; *Musgrave v. Morrison*, 54 Md. 161; *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

⁴⁹¹ Great force is added to the reason for thus holding when the purpose of the action is to procure funds with which to pay the creditors of an insolvent corporation. Nearly \$50,000 was paid in by the individual subscribers, the purpose of which payment could have been nothing else but to enable the corporation to commence its proposed business. As against creditors the defendants cannot rely on the *Schram* case.

The respondents, however, present two other questions which are material:

1. It is sought to hold the respondents for the subscription of "C. F. White, as trustee," under the fourth and fifth paragraphs of the complaint.

The position of the respondents on this point is, that, in the absence of fraud, parol evidence is not admissible to show that the subscription was other than what upon its face it appears to be; that the word "trustee" added to the name of the subscriber in such a case in making an original subscription, whatever may be its effect as to transfers and other entries upon the books of the company, has no effect whatever; and that the effect of our statute is to relieve the trustee from personal liability and to charge the trust estate, if any, and not to create a trust where there is no estate, or to charge a third party upon the allegation that he was the real party in interest, and in that way open the door for the admission of parol evidence to vary the contract.

The statute referred to is General Statutes, section 1512: "No person holding stock as executor, administrator, guardian, or trustee . . . shall be personally subject to any liability as a stockholder of the company; but . . . the estate and funds in the hands of . . . the trustee shall be liable in like manner and to the same extent as the . . . person interested in the trust fund would have been, if he or she had been living and competent to act and hold the stock in his or her name."

⁴⁹² But this law can have no bearing upon a case like this, for if one who has no estate for which he is acting as a trus-

tee can subscribe for stock and escape liability by affixing the words "as trustee" to his signature, he is being directly aided by the law to commit a fraud both upon the corporation and other subscribers, which was never intended. The first proposition, viz., that parol evidence is not permitted to show that the subscriber "as trustee" is not the real subscriber, has received general sanction in England: Cook on Stocks and Stockholders, sec. 253. But in this country the rule has not been adhered to: *Burr v. Wilcox*, 22 N. Y. 551. While a trustee is not an agent, an agent is an agent in whatever way he may describe himself. We can see no greater reason for restricting inquiry into this kind of a contract than into any other. In *Stover v. Flack*, 30 N. Y. 64, it was held that although Stover alone subscribed for the stock, yet under the arrangement between him and Flack the latter was a stockholder, and was liable to contribute toward the debts of the corporation. Here the allegation is broadly made that White made the subscription as the agent of the respondents, at their request, and for the benefit of each of them, in proportion to his individual subscription. In other words, it was a "pool" subscription by a dummy, which was understood by the corporation and was ratified by it as the subscription of the individuals. Nothing could be more strongly stated, and we think a cause of action was alleged.

2. The other point contended for by respondents is that the receiver, being the representative of the corporation and standing in its shoes, cannot maintain the action, because, inasmuch as the stock had not all been subscribed for, and the subscriptions were therefore not absolute, the corporation itself could not sue thereon. Perhaps it might be justly argued, from what has been said upon the subject of the alleged waiver of the full subscription, that in this ⁴⁹³ case the corporation could have sued notwithstanding the subscription of the Satsop Railroad Company. But it is not necessary to so hold in this case, for we think this particular receiver could maintain the action whether the corporation could do so or not. The authorities cited to our attention do not, when examined closely, hold to the contrary. The language used in High on Receivers, sections 201, 315, is general, to the effect that a receiver is usually only clothed with such rights of action as the person or corporation over whose estate he has been appointed might have maintained; but the same volume recognizes it as usual for receivers to pursue and

recover property of an insolvent sufficient to pay creditors (sec. 455); and respondents concede that such is the fact. It is to be observed, however, that Mr. High's work, so far as receivers appointed at the suit of creditors in aid of execution are concerned, is based almost entirely upon New York cases, which, in turn, are founded upon the very full provisions of the code and laws of that state: See c. 12, title "Creditors." But at section 324 *a* the same author gives the same weight to decisions in Maryland and New York, holding that when there were acts of waiver on the part of the subscriber he would be estopped to defend against a suit on his subscription by a receiver, on the ground that the stock had been only partially subscribed, or that he had been deceived by false representations as to the condition of the paid-up capital.

Farnsworth v. Wood, 91 N. Y. 308, discussed a personal liability imposed upon stockholders to the extent of the par value of their holdings, and did not depend upon subscriptions at all. *Haskell v. Worthington*, 94 Mo. 560, is a negative authority on the question of the effect of a waiver; but on the point in discussion it does not support the respondents. The plaintiff appears to have been a common-law assignee of an insolvent corporation merely, who, it is well understood, takes ⁴²⁴ nothing but what is conveyed to him by the deed of assignment, and does not represent creditors: *Bouton v. Dement*, 123 Ill. 142. *Mann v. Pentz*, 3 N. Y. 415, depended entirely upon statute, the result turning upon the fact that it was sought to sustain an action by the receiver of a manufacturing corporation against a stockholder by a statute which applied only to moneyed corporations. In *Republic Life Ins. Co. v. Swigert*, 135 Ill. 150, the receiver was appointed upon the application of the state auditor showing the insolvency of the corporation, and asking that its affairs be wound up. The receiver applied for leave to proceed against certain stockholders to set aside a cancellation of their subscriptions made by agreement with the company some years before. The court held that the transaction amounted to a purchase of its own stock by the corporation, which, as between the parties, was a valid one, and that the receiver stood so exactly in the shoes of the corporation that he could not overturn the arrangement made with stockholders. The opinion is based upon the statute of Illinois, which is a winding-up act of the affairs of insolvent insurance companies, and expressly prescribes the powers of

receivers under it, which are held not to constitute them the representatives of creditors, except in the matter of distribution. But on page 172 this is said: "Almost all of the cases cited by defendant in error fall in one or the other of the four classes following: Where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance and to secure whose claims he was appointed. . . . With the law of such cases we have no fault to find."

It is needless to call attention to the fact that the case before us is of the class mentioned. There is no reason apparent why Le Ballister & Co. might not have brought ⁴⁹⁵ this suit for themselves and such other creditors having unsatisfied judgments as might join them, for there is no specific property to be taken possession of; but it is certainly a common method of procedure for a receiver to be appointed in such cases, and when appointed he represents creditors and not the corporation, and by the order appointing him becomes possessed of the rights of creditors for the purposes of collection as fully as though their judgments were assigned to him. The cases cited from Maryland, *supra*, were all cases of this class, not depending upon statute.

The judgment is reversed, with directions to the superior court to overrule the demurrer.

DUNBAR, C. J., and ANDREWS, J., concur.

SCOTT, J., concurs in the result.

HOYT, J., dissents.

CORPORATIONS. — LIABILITY OF STOCKHOLDERS ON SUBSCRIPTIONS: A stockholder of a corporation is liable to its creditors upon his unpaid stock subscription, and the fact that other stockholders may have been released as to their subscriptions by a decree of court is no defense to him unless such action increased his liability: *Howard v. Glenn*, 85 Ga. 238; 21 Am. St. Rep. 156, and note. Stock subscriptions are not invalidated by the irresponsibility of other subscribers for shares necessary to be subscribed before the organization of the corporation, if such other subscriptions were made and accepted in good faith by the company: *Penobscot R. R. Co. v. White*, 41 Me. 512; 66 Am. Dec. 257. See, also, the extended notes to *Franklin Glass Co. v. Alexander*, 9 Am. Dec. 100, and *People v. Montecito Water Co.*, 33 Am. St. Rep. 184.

CORPORATIONS. — SUITS BY RECEIVERS TO ENFORCE UNPAID STOCK SUBSCRIPTIONS: See the extended note to *Thompson v. Reno Sav. Bank*, 8 Am. St. Rep. 833, 834.

TIMES PUBLISHING CO. v. CITY OF EVERETT.

[9 WASHINGTON, 518.]

PLEADINGS—MISJOINDER OF CAUSES OF ACTION—DEMURRER.—If a complaint contains a statement of one good cause of action, and an attempted statement of another calling for a species of relief which cannot be granted under any state of the pleadings, a demurrer for misjoinder of causes of action does not lie, provided the complaint contains a continuous statement of facts and is not divided into separate counts or causes of action.

MANDAMUS AGAINST MUNICIPAL CORPORATIONS.—Mandamus does not lie to compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in response to calls for bids to do city work.

MUNICIPAL CORPORATIONS—INJUNCTION AGAINST AWARD OF CONTRACT.—Agents of municipal corporations must maintain themselves within the law in the matter of awarding contracts for city work; and if through fraud, or manifest error, not within the discretion confided to them, they are proceeding to make a contract which illegally casts upon taxpayers a substantially larger burden of expense than is necessary, they may be enjoined to the extent of restricting their action within proper bounds.

MUNICIPAL CORPORATIONS—INJUNCTION AGAINST AWARD OF CONTRACT—JUDICIAL DISCRETION OF CONTRACTING AGENT.—Under a statute requiring a contract for city work to be let to the lowest and best bidder some judicial discretion is vested in the city council in determining who is such bidder. The responsibility of the bidder, his experience, and his facilities for carrying out the contract may be looked into, and an honest determination that his bid, though the lowest, is not the best, must control; but, in every such case, to protect itself from interference by injunction at the suit of a taxpayer, such council must judicially find the facts, which in its judgment render the apparently lowest bid, not the best nor lowest in fact.

MUNICIPAL CORPORATIONS—INJUNCTION AGAINST AWARD OF CONTRACT—INTEREST SUFFICIENT TO MAINTAIN.—The direct interest in the controversy possessed by a taxpayer, as one liable to be taxed, is sufficient to enable him to maintain, as plaintiff, an action to enjoin the letting of a contract for the doing of city work, no matter what his ulterior motives may be in prosecuting the suit.

Church & Akerman, for the appellant.

H. D. Cooley and N. D. Walling, for the respondents.

519 **STILES, J.** General Statutes, section 649, provide that in cities of the third class the council shall annually, at a stated time, contract for doing all city printing and advertising, which contract shall be let to the lowest bidder; advertising to be done in a newspaper printed and published in such city. The city of Everett, by ordinance No. 3, fixed the stated time as April 1st; required that the newspaper

must have been published at least one year before the date of contract, and that the contractor must give bond as the council might determine; and directed the city clerk to give notice, by publication, of the annual letting.

Pursuant to this ordinance the clerk gave a notice that bids for the city advertising would be received at a certain time. The notice stated no particulars of what would be required in the way of advertising, or how the bids should be framed. At the proper time two bids were presented, one by appellant, and one by James N. Bradley. Appellant's bid was for solid nonpareil at twenty-five cents per inch for the first insertion, and fifteen cents for subsequent insertions. Bradley's bid was for the same kind of type at one dollar per inch for the first, and fifty cents for each subsequent insertion. Other propositions of the two bidders ⁵²⁰ were substantially the same, except that Bradley offered that if the contract were awarded to him he would publish the official proceedings of the council free of cost to the city, and the city delinquent tax list at the rate of five cents for each description.

The council awarded the contract to Bradley by resolution, declaring him to be the "lowest and best bidder therefor." There was no other finding concerning either of the bids. Appellant, in its complaint, shows these facts, and that a contract based upon his bid has been entered into between the city and Bradley; and also that it is a taxpayer in the city of Everett. The object of the action, as stated in the prayer, is to enjoin the performance of the contract, and to require the city to enter into a contract with itself as the lowest bidder for the advertising.

Four grounds of demurrer were alleged: 1. No jurisdiction of the subject matter; 2. Defect of parties, in that the individual members of the council were not made defendants; 3. Several causes of action improperly joined; 4. Not sufficient facts to constitute a cause of action.

We are not advised upon which of the grounds the court sustained the demurrer, but only the last two are argued here:

As to the third, it is urged that the appellant is seeking relief in a dual capacity, and inconsistent relief at that. As a taxpayer it would enjoin the performance of the contract on the ground of its illegality, and because, by reason of the high price agreed to be paid for advertising in face of the lower bid, it will suffer wrong in excessive taxation. In this

capacity, it has no interest in its own bid, and the result of the suit would be a new letting of the contract. But as bidder its object is to secure a contract for itself, based upon its low bid, and it has no concern whether the city go on with the Bradley contract or not. There is no question but that the complaint was framed with the ⁵²¹ double purpose of enjoining the defendants at the suit of a taxpayer, and of procuring a mandamus for its own benefit as a bidder; and the brief frankly concedes this. This was an attempt to improperly join two causes of action, to the second of which Bradley was neither a necessary nor a proper party. But if there was a statement of one good cause of action, and an attempted statement of another which called for a species of relief which would not be conceded under any state of the pleading, we think a demurrer for misjoinder ought not to lie. It must be premised that this complaint is not divided into separate counts or causes of action, but is a continuous statement of facts, only two paragraphs of which, the twenty-first and twenty-seventh, together with the prayer, indicate a design to claim relief other than by the injunction. Strike out such portions of the paragraphs mentioned as pertain to the appellant's prospective profits under its bid and the prayer for a mandamus and there will be left only a taxpayer's complaint for injunction, which, in our view, is the only sustainable cause of action.

The generally accepted rule is, that the courts will not by mandamus compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in a competition of this kind: *High on Extraordinary Legal Remedies*, sec. 92; *State v. Board of Education*, 24 Wis. 683; *Kelly v. Chicago*, 62 Ill. 281; *State v. McGrath*, 91 Mo. 386; *Douglass v. Commonwealth*, 108 Pa. St. 559; *Madison v. Harbor Board*, 76 Md. 395.

The case of *Baum v. Sweeny*, 5 Wash. 712, is distinguishable from the foregoing citations in that the adjudication there had was upon an appeal which lay directly from the board of county commissioners to the superior court, and there was only one bid which was entitled to consideration under the statute. Added force is ⁵²² given to the rule by our statute which provides that the council may reject all bids presented and readvertise at their discretion.

On the other hand, the agents of municipal corporations must maintain themselves within the law in the matter of

awarding contracts, and, if through fraud or manifest error not within the discretion confided to them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds: Beach on Public Corporations secs. 634, 635; Dillon on Municipal Corporations, sec. 922; *Crampton v. Zabriskie*, 101 U. S. 601; *Mayor v. Keyser*, 72 Md. 107; *People v. Dwyer*, 90 N. Y. 402; High on Injunctions, secs. 1251-1253.

The case of *State v. Milligan*, 3 Wash. 144, in no way contravenes this rule. The sole matter of discretion there discussed was that as to whether the council of the city of Tacoma could, under the peculiar language of the city charter, contract with one who, at the time, was not the publisher of a newspaper; and all that was said upon the subject of non-interference by courts of equity was directed to that point, and nothing else. And so, in this case, even under the strict language of the statute requiring the contract for advertising to be let to the lowest bidder, it must be conceded that there would be some discretion of a judicial character left to the council. A guide to the exercise of this discretion was enacted in ordinance number 3, providing that the newspaper must have been published at least one year, and that a bond should be given by the contractor. So, also, if the proposed contract were to cover many different items, bid for at different rates, and the quantities were not previously ascertained, it would take an extremely strong case to call for equitable interposition; as, also, if the bids were ⁵²³ for large amounts, and the differences between bids were small and inconsiderable: *Kelly v. Chicago*, 62 Ill. 281.

The responsibility of the bidder, his experience, and his facilities for carrying out a contract may be looked into, and an honest determination that on the whole his bid will not be, in the long run, the lowest, will be entitled to control: *Commonwealth v. Mitchell*, 82 Pa. St. 343; *Findley v. Pittsburgh*, 82 Pa. St. 351; *Douglass v. Commonwealth*, 108 Pa. St. 559.

But in every such case, in order to protect itself from interference, the contracting agent should judicially find the facts which, in its judgment, render the apparently lowest bid not the lowest in fact: Beach on Public Corporations, sec. 698.

We have this case upon the complaint alone, and under its allegations the conclusion cannot be escaped that there was

on the part of the council a gross disregard of the interests committed to it in making its award. It found nothing but that the bid of Bradley was the lowest and best, but the complaint shows affirmatively that the appellant was in every respect qualified and competent, and was equally entitled to consideration with its competitor. Yet, with the bidders standing upon an equal footing, the contract was awarded to that one whose bid was almost four times that of his rival, without any apparent excuse or reason but the arbitrary will of the council. It was shown that for the previous year this printing cost about five hundred dollars, but with the same amount of work this year it will cost two thousand; a very substantial addition to the tax-roll of a city of this class.

Kimball v. Hewitt, 2 N. Y. Supp. 697, is cited in support of the position that appellant ought not to be allowed to maintain an action of this kind, in view of the disclosure that its interest is prompted by other considerations than its liability to excessive taxation. Examination of the opinion in that case shows several other important matters to have ⁵²⁴ entered into the decision, chief among which was that the action appeared to be in the interest of a bidder which had attempted to perpetrate a fraud on the city by withdrawing its bid, which was the lowest one made, and to recover a certified check which would have been forfeited had it refused to enter into a contract.

Mazet v. Pittsburgh, 137 Pa. St. 548, is a well-considered case, holding, in effect, that if the plaintiff in cases of this kind is not a mere volunteer, but has a direct and substantial interest in the controversy, as being one who is liable to be taxed, in common with the general public, for the work contracted for, his ulterior motives will not be permitted to disqualify him.

The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer and proceed upon the cause of action sustained.

ANDERS and SCOTT, JJ., concur.

HOYT, J., dissents.

MANDAMUS TO CONTROL THE EXERCISE OF OFFICIAL DISCRETION: See the extended notes to *Weeden v. Town Council*, 98 Am. Dec. 375; *Dane v. Derby*, 89 Am. Dec. 735, and the notes to *Wood v. Strather*, 9 Am. St. Rep. 257, and *State v. Barnes*, 23 Am. St. Rep. 525.

INJUNCTION BY TAXPAYER TO RESTRAIN MUNICIPALITY.—A taxpayer may sustain a bill to enjoin the imposition of an unjust and illegal burden on the municipality or to prevent its property from being wasted or squandered; *McCord v. Pike*, 121 Ill. 288; 2 Am. St. Rep. 85, and extended note.

BOWMAN v. FIRST NATIONAL BANK.

[9 WASHINGTON, 614.]

BANKS AND BANKING—COLLECTIONS—TRUSTS.—A transaction by which a draft is sent to a bank for collection and remittance, collected and the proceeds placed in its vaults by the bank, it merely forwarding a draft in payment, establishes, as between the correspondent and the bank, the relation of debtor and creditor, and not that of *cestui que trust* and trustee.

EVIDENCE.—**JUDICIAL NOTICE** is taken of the fact that a bank, when it makes a collection for a foreign correspondent, never, unless specially directed, remits the specie collected, but instead thereof always takes the specie to its own use, and sends therefor its draft or certificate of deposit.

CUSTOM—EVIDENCE TO PROVE.—**PARTIES ARE PRESUMED** to have dealt with reference to a general custom, and, in order to correctly interpret their intentions, evidence is admissible to put the court or jury in possession of a knowledge of the custom in the light of which the parties transacted their business.

BANKS AND BANKING—TRUST FUNDS.—Funds in the hands of a bank not impressed with a trust at the time the bank ceases to do business are not impressed with a trust in the hands of the receiver of such bank.

C. S. Voorhees and Jones, Voorhees & Stephens, for the appellants.

Richardson & Gallagher, for the respondents.

¶14 HOYT, J. This cause was tried in the lower court upon an agreed statement of facts, and upon its determination there has been brought here and submitted on the record made up of such agreed statement with the findings of the ¶15 court as to the facts and law flowing therefrom. In deciding the case the superior court struck out and refused to consider certain paragraphs of such statement, but its action in so doing cannot affect the hearing here. If its action was erroneous this court will consider these paragraphs as though they had not been stricken, and, if it was correct, we would disregard them even although they had not been stricken.

From such statement of facts it is made to appear that on the eleventh day of July, 1893, the respondents sent to the First National Bank of Spokane, for collection and remit-

tance, a draft on P. Larson & Co. for nine hundred and forty-six dollars. That said bank received said draft on the fourteenth day of July, and on the 22d collected the same from said P. Larson & Co. That the respondents did not at the time have any account with said bank. That, on the twenty-second day of July, the bank, after having collected the money, issued its draft in the usual form on the American Exchange National Bank of New York city, payable to the order of respondents, for the amount of the collection, less its charges, and mailed it to the respondents at their address, postage prepaid. That before said draft reached the respondents, the bank being insolvent, did, on the twenty-sixth day of July, suspend and cease to do a banking business. That thereafter the respondents, in the usual course of business, duly presented said draft to said American Exchange National Bank for payment, and payment thereof was refused. That the said First National Bank, in sending said draft to respondents by mail as aforesaid, followed the usual and established custom of banks in making remittances of moneys collected for customers from outside the city where the bank is located. That the money so collected was by the bank placed in its vaults and commingled with other large sums of money contained therein. That soon after the bank ceased to do business, a bank examiner took possession of its assets, and soon after transferred ^{§16} them to a receiver duly appointed for the purpose of winding up its affairs. That at all times after the collection was made, as above stated, until the time the assets of the bank were so transferred to the receiver there were moneys in the vault of the bank in excess of the amount collected for the respondents. That demand had been regularly made upon both the bank and the receiver for the moneys so collected, but that the same, or any part thereof, had never been paid.

Under these facts it is claimed, on the part of the respondents, that in making the collection the defendant bank acted as their agent, and held the money when collected, as their trustee; that by reason of the same having been placed with other moneys of the bank, and the receiver having come into possession, by virtue of his office, of certain of such moneys, amounting to more than the sum collected, became their trustee, and that so much of such money as is necessary to pay their claim is a trust fund, which he must pay to them without regard to the claims of general creditors.

On the part of the appellants it is claimed that the transaction between the respondents and the defendant bank created the relation of debtor and creditor as to the moneys collected, and that the bank never held such moneys as the trustee of the respondents. It is further claimed, that, even if the bank did so hold such moneys, the trust was not impressed upon the property in the hands of the receiver, for the reason that the identical money collected, or any part thereof, had not been traced into his hands. The latter claim has been most elaborately argued by the respective counsel. From such argument it is made to appear that there is a conflict of authority upon this question. Some of the courts hold to the strict rule that the trust cannot be enforced unless the specific property, or something into which it has been changed, can be followed and identified; ⁶¹⁷ and others, that whenever it can be shown that the estate in the hands of the receiver or assignee has been benefited or increased by the trust property, it will be impressed with the trust relation, and others take position between these two extremes.

These questions are very interesting, and of such paramount importance that they should not be decided except in a case where their decision is necessary to a determination of the rights of the parties. In the case at bar such decision is not necessary if the relation created by the transaction between the respondents and the defendant bank constituted the bank the debtor of the respondents instead of their trustee at the time the bank went into the hands of a receiver. And this relation must depend upon the understanding with which the respondents must be held to have sent the collection. The question of what that understanding must be held to have been is presented under two branches. One requires its determination upon the question of the forwarding of the claim for collection, and remittance; uninfluenced by any thing done thereafter and the other upon the like facts as influenced by the action of the parties after the collection. The determination of the first branch of the question in the light of the admission in the statement of facts does not seem to us difficult. It is admitted that when the bank, after having made the collection, placed the money in its vaults as its own, and remitted therefor its draft on its New York correspondent, it acted in accordance with the general custom of banks in such transactions, and, such being the fact, it would seem that the relation of debtor and creditor

was created. If this was the general custom the legal effect of forwarding the collection and directing remittance of the proceeds would be the same as though the money had been paid to the bank for its draft, which it was at the same time required to issue. And such a transaction between a bank ⁶¹⁸ and one of its customers has never been held to create any trust relation between such customer and the bank. Under such circumstances the title to the money passes to the bank, and its responsibility to the one who pays it to them is thereafter that of a drawer of the bill of exchange.

It follows that, under the conceded facts, the bank became the debtor of respondents, and not their trustee. This admission was stricken out in the lower court, but we see no reason why it was not material to show that a general custom existed which had a bearing on the transaction between the parties. And we think that the rights of the parties should be determined in the light of this general custom. If it was a general custom the parties are presumed to have dealt with reference thereto, and, in order to correctly interpret their intentions, the court or jury should be put in possession of the custom in the light of which they transacted their business. But the result would necessarily be the same if this paragraph of the statement of facts had been left out. The custom of banks in regard to making collections and remitting therefor is so well established, and has become so universally known, that knowledge thereof must be imputed to the courts, and they are therefore required to take judicial notice of the fact that a bank, when it makes a collection for a foreign correspondent, never, unless specially directed so to do, remits the specie collected, but instead thereof always takes the specie to its own use, and sends therefor its draft or certificate of deposit.

Among the large list of authorities which could be cited to sustain this proposition we call attention to the following: 1 Morse on Banks and Banking, sec. 248; *Jockusch v. Towsey*, 51 Tex. 130; *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Marine Bank v. Rushmore*, 28 Ill. 463; *Tinkham v. Heyworth*, 31 Ill. 519.

It follows that, in our opinion, the transaction, even if ⁶¹⁹ uninfluenced by any action of the respondents after the collection was made, would have established between them and the defendant bank the relation of creditor and debtor, and not that of *cestui que trust* and trustee. But, if this were not

so, the act of the respondents in receiving the draft and forwarding it for collection would clearly show an intent on their part to pass the title to the specie collected to the defendant bank, and accept its responsibility as drawer of the draft of which they were the payees in lieu thereof. They accepted such draft without objection, and disposed of it in the usual course of business, and by so doing put themselves in the same relation to the bank as they would have been if they had forwarded the money, and directed it to send its draft or certificate of deposit therefor.

No funds impressed with a trust in favor of the respondents were in the hands of the bank at the time it ceased to do business; hence the funds in the hands of the receiver are not impressed with any trust in their favor.

The judgment of the superior court must be reversed, and the cause remanded with instructions to dismiss the action.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

BANKS—COLLECTIONS—DEBTOR AND CREDITOR.—The relation between a bank transmitting paper for collection and a bank receiving and collecting such paper and mingling its proceeds with its other funds, is that of debtor and creditor merely: *First Nat. Bank v. Davis*, 114 N. C. 343; 41 Am. St. Rep. 795, and note. If a collection indorsed to a bank is collected by it, and it afterward makes an assignment for the benefit of creditors, the relation between it and the owner of the property is that of debtor and creditor, and he cannot impose any trust upon the proceeds in the hands of the assignee, unless there was some arrangement by which the funds were to be held separate and the identical proceeds remitted: *Akin v. Jones*, 93 Tenn. 353; 42 Am. St. Rep. 921, and note.

CUSTOM—WHEN PRESUMED TO HAVE ENTERED INTO CONTRACT.—When a custom is general, every person who makes a contract is presumed to know the custom, and it enters into the contract and binds him: *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471. A custom, if known to the parties to a contract to which it relates, is obligatory, and unless excluded by the terms of the contract enters into it, and is regarded as a part of it: *First Nat. Bank v. Fiske*, 133 Pa. St. 241; 19 Am. St. Rep. 635, and note. Knowledge of a usage may be inferred from circumstances or implied from its notoriety: *Barry v. Hannibal etc. Ry. Co.*, 98 Mo. 62; 14 Am. St. Rep. 610. See, also, the note to *Mutual Assur. Society v. Scottish Union etc. Ins. Co.*, 10 Am. St. Rep. 826.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

KLIEFORTH v. STATE.

[88 WISCONSIN, 168.]

"NIGHT-TIME," WHAT IS.—In the absence of statutory definition, it is "night-time" so long as a man's face cannot be discerned; otherwise, without taking moonlight into consideration, it is daytime. Hence, an instruction fixing the end of night and the commencement of day at exactly one hour before sunrise is erroneous.

KLIEFORTH and another, the plaintiffs in error, were convicted of assault and battery upon one F. M. Lamb, who, on the morning of September 1, 1893, between the hours of 4 and 5 o'clock, shot and killed a duck. Klieforth was a game warden, and, as such, arrested Lamb within a few minutes after the shot was fired. One Cummings assisted Klieforth in making the arrest. Klieforth was authorized, under the statute, to arrest any person, without a warrant, whom he found in the act of shooting ducks "in the night-time." Plaintiffs in error were therefore guilty of committing the assault and battery charged, if the shooting was done in the daytime; otherwise they were not. The case turned upon this one question of fact. The state's evidence showed that the duck was shot at 4:30 o'clock A. M., while the evidence for the defense showed that it was shot at 4:04. It was proved that the sun rose at 5:21. The court instructed the jury as stated in the opinion. Plaintiffs in error were found guilty, and sued out a writ of error.

James J. Dick and Frank M. Lawrence, for the appellants.

Attorney General and J. M. Clancey, assistant attorney general, for the state.

¹⁶⁵ WINSLOW, J. The pivotal question in the case was whether the duck was shot in the night-time or in the day-time; and the court charged the jury that if it was shot before 4:21 A. M., then it was shot in the night, and if after that time, then it was shot in the daytime. This instruction fixed the end of night and the commencement of day at a definite minute of time—just one hour before sunrise. We have been referred to no authority which sustains this definition of “night,” and we think that it must be held erroneous. In the case of burglary the rule is thus stated by Blackstone (4 Blackstone’s Commentaries, 224): “If there be daylight or *crepusculum* enough, begun or left, to discern a man’s face withal, it is not burglary. But this does not extend to moonlight.” This rule was approved by this court in *Nicholls v. State*, 68 Wis. 416; 60 Am. Rep. 870. It is substantially supported by the general current of decisions in those states where, as in Wisconsin, there is no statutory definition: 16 Am. & Eng. Ency. of Law, 707, and cases cited in note 3. We see no good reason for applying one definition to the word in “burglary” and another definition in a prosecution for violation of the game laws. It is plain that, in view of ¹⁶⁶ the evidence, the erroneous definition given by the court might have been, and probably was, very prejudicial to the defendants’ case.

By the COURT. Judgment reversed, and cause remanded for a new trial.

NIGHT-TIME is sometimes defined by the statute as the period between sunset and sunrise. At common law it was not confined to this exact period, but was extended to that period when there was not enough daylight left to discern a man’s face. The fact that the features can be distinguished by reflection from the street lights on the snow or by moonlight does not affect the question of time in respect to burglary: See note to *People v. Richards*, 2 Am. St. Rep. 388.

STATE v. JUNEAU.

[88 WISCONSIN, 180.]

WITNESSES—COMPETENCY OF CHILD TO TESTIFY.—The competency of a child above the age of four years to testify as a witness is a question addressed to the discretion of the trial court, and must be determined by an examination of the child in court. Competency, in such a case, depends upon intelligence.

CRIMINAL LAW—"OPEN AND GROSS LEWDNESS"—EVIDENCE.—A person may be convicted of the offense of "open and gross lewdness," upon the testimony of a child five years and five months old, who was less than five years old when the offense was committed, if there is some corroboration of its testimony.

GROSS LEWDNESS, ACT OF, IS "OPEN," WHEN.—Under a statute providing for the punishment of "open and gross lewdness," an act of gross lewdness is "open" though committed in a private place, and in the presence of but one person. Hence, such an act is "open" if committed in the presence of a child of tender years.

JUNEAU was convicted of the statutory offense of "open and gross lewdness and lascivious behavior," alleged to have been committed in a building occupied by the defendant, no one being present at the time except the defendant and a little girl named Clara Brown, who was at that time about four years and nine months old, and who was about five years and five months old at the time of the trial. The alleged offense consisted of the indecent exposure of defendant's person to said child, and the commission of an indecent assault upon her. The conviction was had upon the child's testimony, corroborated by that of her mother, and a physician who was called to examine her a short time after the alleged assault. The following questions, considered important and doubtful by the trial judge, were certified for the decision of the supreme court: 1. "Did the circuit court err in permitting the child, Clara Brown, to testify in this case"? 2. "Can a conviction for a criminal offense be sustained upon the testimony (with some corroboration) of a child who was under the age of five years at the time the offense is alleged to have been committed"? 3. "Is an act of gross lewdness 'open,' within the meaning of section 4579 of the Revised Statutes, when committed in a private place, and when no one is present except the defendant and the person upon whom the act is alleged to have been committed"? The report of the case to the supreme court was made under section 4721 of the Revised Statutes.

Attorney General and J. M. Clancey, assistant attorney general, for the plaintiff.

S. S. Hamilton, for the defendant.

182 NEWMAN, J. It seems to be the settled law that, after four years of age, a child is not incompetent to testify as a witness by reason of any rule of law which excludes him. Whether a child above that age is competent to testify depends upon his intelligence, which is to be determined by the trial court by examination of the child in court. The question is addressed to the discretion of the trial court. Its determination on such examination is final, except in a clear case of the abuse of its discretion. "It may be regarded as well settled that whenever there is intelligence enough to observe and to narrate, there a child (a due sense of the obligation of an oath being shown) can be admitted to testify": 1 Wharton on Evidence, 3d ed., sec. 398. "Age, at least after four years are past, does not touch competency; and the question is one of intelligence, which, whenever a doubt arises, the court will determine to its own satisfaction by examining the infant on his knowledge of the obligation of an oath, and the religious and secular penalties for perjury": 1 Wharton on Evidence, sec. 399. "It will require a strong case to sustain a reversal of the ruling of the court examining such a witness": 1 Wharton on Evidence, sec. 400. See cases cited in the brief of the attorney general. Also, *State v. Morea*, 2 Ala. 275; *Wade v. State*, 50 Ala. 164; *Blackwell v. State*, 11 Ind. 196; *State v. Denis*, 19 La. Ann. 119; *People v. Bernal*, 10 Cal. 66; *State v. Whittier*, 21 Me. 341; 38 Am. Dec. 272; *State v. Le Blanc*, 3 Brev. 339; *State v. Jackson*, 9 Or. 457. Whether the trial court determined rightly the questions of the competency of the witness is not presented here. That is a question of fact. 183 Only questions of law are to be reported, under the statute, or considered by this court: *State v. Gross*, 62 Wis. 41; *State v. Cornhauser*, 74 Wis. 42. The court, being satisfied of the competency of the witness, did not err in permitting her to testify in the case.

2. Ordinarily the testimony of one competent witness is sufficient to sustain a conviction. There are crimes for which it is not competent to convict upon the uncorroborated testimony of one witness. These are exceptions from the general rule, created either by statute or some established rule of the common law. Except in these excepted

cases the testimony of one witness answers at law. Even the testimony of an accomplice is sufficient (*Black v. State*, 59 Wis. 471), and that even in a capital case: *United States v. Neverson*, 1 Mackey, 152; *United States v. Bicksler*, 1 Mackey, 341. The weight of the evidence is for the jury. If they are satisfied by it beyond a reasonable doubt, it is legally sufficient. Even in cases of rape there is no inflexible rule which requires corroboration of the complainant's testimony. Such corroboration is expected, and its absence seriously impairs the case of the prosecution. But the law itself is satisfied with such corroboration as is practically procurable; else many crimes could be perpetrated with impunity: 1 Wharton's Criminal Law, 9th ed., sec. 565. It is, to a great extent, in the discretion of the trial court, in most cases, whether corroboration shall be required, and how much: *Ingalls v. State*, 48 Wis. 649; *Black v. State*, 59 Wis. 471. Under the direction of the court an intelligent jury are not likely to err in giving undue credit and force to the testimony. If that should happen it is always within the power of the court to correct such a mistake by a new trial. It appears by the report that there was some corroboration of the principal witness. Whether the whole evidence supports the conviction cannot be answered here: *State v. Gross*, 62 Wis. 41. The court being satisfied by its ¹⁸⁴ examination that the witness was competent to testify, and that practically all the corroborative testimony which was practically procurable had been produced, and being satisfied of the truth of the verdict, the conviction is lawful, and should be sustained.

3. The act alleged against the defendant is an act of "open and gross lewdness," within the meaning of the statute. The statute punishes not public, but open, lewdness. The phrase "open and gross lewdness" is not equivalent to the phrase "gross lewdness in an open place." The word "open" has no reference to place at all, nor to number of people. It is used simply to define a quality of the act of lewdness. It is "open lewdness" as opposed to "secret" lewdness. It defines the same act, regardless whether it is committed in presence of one or of many. The offense may be committed by the intentional act of exposing one's person indecently in the presence of one person, to whom it is offensive, as well as in the presence of many persons. It could not change the quality of the act that it was committed in

the presence of a child of tender years, too innocent to be offended by it. The benignity of the law would neither presume nor permit the consent of such a child to such an act: *Fowler v. State*, 5 Day, 81; *Grisham v. State*, 2 Yerg. 589; *State v. Millard*, 18 Vt. 574; 46 Am. Dec. 170; *Commonwealth v. Wardell*, 128 Mass. 52; 35 Am. Rep. 357.

By the COURT. The first question is answered in the negative. The second and third questions are answered in the affirmative. It will be so certified to the circuit court.

WITNESSES—CHILDREN.—The competency of a child as a witness depends upon its intelligence, its power to distinguish between good and evil, and its moral comprehension of the obligations of an oath: See note to *McGuff v. State*, 16 Am. St. Rep. 31. These matters must, of course, be determined from the court's examination of the witness. The trial may be postponed to enable the child to be instructed as to the nature of an oath: *Taylor v. State*, 22 Tex. App. 529; 58 Am. Rep. 656, and note.

INDECENT EXPOSURE.—Exposure by a man of his private parts to one woman only, with solicitation of sexual intercourse, is "open and gross lewdness and lascivious behavior," for which an indictment will lie: *State v. Millard*, 18 Vt. 543; 46 Am. Dec. 170. So is indecent exposure of his person by a man in a house to a girl eleven years old: *Commonwealth v. Wardell*, 128 Mass. 52; 35 Am. Rep. 357.

CITY NAT. BANK OF DAYTON, OHIO, v. KUSWORM.

[88 WISCONSIN, 188.]

NEGOTIABLE INSTRUMENTS—DEFENSES.—The maker of a promissory note cannot avoid payment thereof on the ground that it was given to compound a felony.

NEGOTIABLE INSTRUMENTS—DURESS AS A DEFENSE.—The defense of duress is not, as a general rule, available in an action upon a promissory note given to prevent the prosecution of another person; but one exception to this rule is, that a wife may avoid her note made under duress of threats of criminal prosecution against her husband, as it is for that reason void.

TO CONSTITUTE AN ESTOPPEL IN PAYMENT some thing must be said or done by the person estopped. The independent act of another person, even though such other person is her husband, cannot create such an estoppel.

IF A LOSS MUST BE BORNE BY ONE OF TWO INNOCENT PERSONS, it shall be borne by him who occasioned it.

DURESS—DISAFFIRMANCE OF CONTRACT WITHOUT RESTORATION OF CONSIDERATION.—A wife may avoid her contract for duress without any reference to formal restoration if she has received no benefit, as there is nothing to restore. Hence, if, under duress of threats of criminal prosecution of her husband on the charge of forging notes deposited as collateral security for his own notes to a bank, a wife gives her

note to the bank for the amount of her husband's notes, and the cashier of the bank delivers the husband's notes and the collaterals to a friend of the wife, who immediately hands them to her, with the request for her to deliver them to her husband, which she does, she may avoid her note, in an action upon it by the bank, upon the ground of duress, without restoring her husband's notes or the collaterals to the bank, as she has received no benefit.

ACTION by the bank to recover the amount due upon a promissory note given to it, and signed by Mollie Kusworm. The defendant pleaded that the note was obtained from her without any valuable consideration therefor, through the fraud of the plaintiff's agent; that it was given to compound a felony; and that it was given under duress of threats to prosecute the defendant's husband (then very sick, and who died soon thereafter) for the crime of forgery, and in consideration of the suppression of documentary proof of his guilt. The defendant admitted the making of the note and the amount, but, not having made full restitution to the plaintiff, which the court below held that she had to do before availing herself of the ground of duress, a verdict for plaintiff was directed for the principal sum and interest, amounting to \$5,157.25. Defendant appealed from the judgment entered in accordance with the verdict.

Bashford, O'Connor, Polleys & Aylward, and Moran, Kraus & Mayer, for the appellant.

Charles Noble Gregory, L. P. Conover, and S. S. Gregory, for the respondent.

193 CASSODAY, J. The execution of the note in suit having been admitted, the plaintiff offered no evidence. On the part of the defendant the evidence, in effect, tends to prove: That on, and for some time prior to, November 1, 1892, the plaintiff held two promissory notes which it had received 194 from the defendant's husband, Moses Kusworm, each of which was signed "M. Kusworm," one being for \$4,100, and the other being for \$800, making an aggregate indebtedness of \$4,900 for money loaned by the plaintiff to him, and that the same were secured by four, five, or six other notes, purporting to be executed by other parties, aggregating in amount \$7,000 or \$8,000, as collateral security for the payment of such indebtedness of \$4,900; that in the forenoon of November 1, 1892, one Gebhart, agent for the plaintiff, having both of said notes, and also said notes so held as

collateral, in his possession, called on the defendant and requested to see her husband; that she told him her husband was very sick; that he said it made no matter, that he must see him, that her husband had borrowed \$4,900 from the plaintiff bank, and that he had come there to either get the money or security; that she then obtained permission from the nurse for Gebhart to see Mr. Kusworm; that Gebhart then had an interview with Mr. Kusworm in his room alone, neither she nor the nurse being present; that finally Mr. Kusworm called the defendant, and she went into his room; that Mr. Kusworm then told her to put on her coat and hat, and go with Mr. Gebhart to Mr. Stone's house, and secure Gebhart for \$4,900 on the mortgage of \$12,000, in which the defendant had an equity of \$6,000, the other \$6,000 of which belonged to Stone, a cousin of Mr. Kusworm; that Gebhart then told her that he had notes with him for \$4,900, which her husband had forged; that he would have the Pinkerton detectives take her husband back to Ohio, and put him in the hospital until he was able to go to jail, and would then put him in prison; that she protested on account of her husband's dying condition, and that it would rob her home and her two little children of a father; that she almost fainted; that Gebhart then said, "No matter"; that he had come as agent of the bank, and must fulfill his ¹⁹⁵ duty; that he must either take Mr. Kusworm back to Ohio or she must take up these notes which Mr. Kusworm had forged; that thereupon she and Gebhart took a cab and drove to the office of the plaintiff's attorney, and that the attorney then got into the cab and they all drove to the house of Stone; that Stone was not at home, and so she left a note, requesting him to call at the attorney's office at 3 o'clock that afternoon; that she then returned to her home and found her husband under the effects of a sleeping-powder, but she was cautioned by the nurse not to speak to him for fear that he might die from the effects; that the defendant was in a very delicate condition and weak at the time, having been in the family way for more than three months, but that she managed to get back to the attorney's office at the time appointed; that she found Gebhart and his attorney there, but Stone did not arrive until some minutes afterward; that Gebhart at once repeated his threats; that when Stone came she introduced Gebhart to him as the man who claimed that her husband had forged

notes to the amount of \$4,900, and that he had come there to secure the debt Mr. Kusworm was liable for, or take him back to Ohio; that she said that, in order to prevent her husband from being taken back to Ohio and prosecuted, she was willing to turn over her equity in the mortgage mentioned to secure the plaintiff. Stone stepped out and got the mortgage, and returned with it in a few minutes, and thereupon Gebhart and his attorney took the matter under advisement, with an agreement that she and Stone, respectively, would meet them at the same office the next morning at 11 o'clock; that she was compelled to wait in the rain for a long time for the cable-cars; that she got home about 8 o'clock in the evening; that she found her children waiting, and her husband scarcely able to open his eyes; that she retired without eating any thing, and spent a sleepless night; that, upon returning to the ¹⁹⁶ attorney's office the next morning, she found Gebhart and Stone there; that Gebhart refused to accept the security she had offered, for the reason that Stone's part of the mortgage was prior to hers; that Gebhart finally offered to accept the security if Stone would agree in writing to prorate with the plaintiff in the mortgage; that Stone at first refused; that Gebhart then repeated his threats, and the defendant cried and begged of Stone to consent and thus save her husband, and that he would lose nothing by it; and thereupon Stone consented and signed the agreement, and the defendant signed the note in suit; that Gebhart then handed an envelope to Stone, supposed to contain the note of \$800 and the note of \$4,100, each signed "M. Kusworm," and also the notes to the aggregate amount of seven or eight thousand dollars held by the plaintiff as collateral thereto, and that Stone thereupon, and in the presence of Gebhart, handed the envelope with the notes therein to the defendant with direction to give them to her husband; that the defendant took the envelope with the notes therein from Stone, and delivered them to her husband as so directed; that she did not examine the notes in the office, and never saw them thereafter, and had no knowledge as to where they were; that she had no conversation with Stone, and did not see him on either of the days mentioned except in the presence of Gebhart and his attorney; that Stone did not see Mr. Kusworm on either of those days, and had not seen him for several weeks before, and did not see him for several weeks afterward; that the only connection Stone had with the matter

was by reason of his owning a part of the mortgage as mentioned; that the defendant did not know what her husband had done with the notes; that he died December 5, 1892, and she was the executrix of his will; that she had looked over her husband's papers, but had never found the notes.

¹⁹⁷ The defendant positively swears that she never signed the \$800 note nor the \$4,100 note, and that she never authorized her husband to sign either of those notes or any notes; but, on her cross-examination, a power of attorney was presented, bearing date September 18, 1891, and which she admits to have been signed by her, authorizing her husband to sign and indorse notes; and it is contended on the part of the plaintiff that Mr. Kusworm signed the \$800 dollar note and the \$4,100 note, respectively, "M. Kusworm," meaning thereby the defendant, Mollie Kusworm, instead of Moses Kusworm. Whatever may be the fact in that regard, yet the evidence in the record is very strongly against any such contentions. There is no evidence that either of those notes was signed by an agent instead of the principal. There is no evidence that Gebhart at any time during any of the several interviews mentioned claimed or pretended that the defendant was the maker of either of those notes, nor that the defendant was, at any time before the making of the note in suit, in any way indebted to the plaintiff, nor that he was there seeking security for any indebtedness of the defendant. Since the verdict was directed for the plaintiff we must, for the purposes of this appeal, assume that the \$800 note and the \$4,100 note were each signed "M. Kusworm" by Moses Kusworm, as and for his own signature, and not as and for the signature of his wife.

There is no evidence that Mr. Kusworm actually forged any note, but simply that Gebhart charged him with having forged the notes, as mentioned. It is true that the defendant testified to the effect that Gebhart claimed that he had forged notes in the amount of \$4,900; but, from the whole evidence, it is very apparent that the real charge made by Gebhart was to the effect that Mr. Kusworm had forged sundry names to the four, five, or six notes, aggregating \$7,000 or \$8,000, which the plaintiff held as collateral security for his indebtedness to the plaintiff ¹⁹⁸ bank, as mentioned. Upon such evidence the trial court directed a verdict in favor of the plaintiff and against the defendant. The correctness of such ruling is the only question here for review.

Manifestly the defendant cannot avoid paying the note upon the mere ground that it was given to compound a felony: *Catlin v. Henton*, 9 Wis. 476; *Schultz v. Catlin*, 78 Wis. 611. The only defense available, if any, would seem to be that the defendant was prevailed upon to give the note in suit by duress. As a general rule the defense of duress is not available in an action upon a note given to prevent the criminal prosecution of another person. To this rule there are certain well-established exceptions. Among other exceptions, a wife may avoid her contract, otherwise valid, by reason of a threatened criminal prosecution of her husband, and conversely; and so a father may avoid his contract by reason of a threatened criminal prosecution of his son, and conversely. Thus, in *Bayley v. Williams*, 4 Giff. 688, affirmed, *Williams v. Bayley*, L. R. 1 H. L. 200, a son forged his father's name, as indorser, upon certain promissory notes, and obtained money thereon from his bankers. The fact of the forgeries having been discovered, which the son did not deny, the bankers, without any direct threat of any prosecution, insisted upon a settlement, to which the father was to be a party. The father consented, and agreed in writing to make an equitable mortgage of his property to secure his son's indebtedness; and it was held that the father was not a free and voluntary agent in the making of such agreement, and hence that the same was invalid. The threatening language to the father in that case was: "If the bills are yours we are all right; if they are not we have only one course to pursue; we cannot be parties to compounding a felony. It is a serious matter. It is a case of transportation for life." This is exceedingly mild when compared with the language addressed ¹⁹⁹ to Mrs. Kusworm, and yet, in the opinion of Lord Westbury in that case, it is said: "I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man; and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community." The same principle has frequently been applied in avoiding contracts made to prevent the criminal prosecution of a parent or child, a husband or a wife, not only in England, but in this country: *Whitmore v. Farley*, 43 L. T., N. S., 192, affirmed 45 L. T., N. S., 99; *Seear*

v. *Cohen*, 45 L. T., N. S., 589; *McClatchie v. Haslam*, 63 L. T., N. S., 376; *Harris v. Carmody*, 131 Mass. 51; 41 Am. Rep. 188; *Foley v. Greene*, 14 R. I. 618; 51 Am. Rep. 419; *Coffman v. Lookout Bank*, 5 Lea, 232; 40 Am. Rep. 31; *First Nat. Bank v. Bryan*, 62 Iowa, 42; *Southern Exp. Co. v. Duffey*, 48 Ga. 358; *National Bank v. Kirk*, 90 Pa. St. 49; *Jordan v. Elliott*, 12 Week. Not. Cas. 56; *Sharon v. Gager*, 46 Conn. 189; *McMahon v. Smith*, 47 Conn. 221; 36 Am. Rep. 67; *Central Bank v. Copeland*, 18 Md. 305; 81 Am. Dec. 597; *Tapley v. Tapley*, 10 Minn. 448; 88 Am. Dec. 76; *Meech v. Lee*, 82 Mich. 274; *Eadie v. Slimmon*, 26 N. Y. 9; 82 Am. Dec. 395; *Osborn v. Robbins*, 36 N. Y. 365; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447; *Schultz v. Culbertson*, 46 Wis. 313; 49 Wis. 122; *Schultz v. Catlin*, 78 Wis. 611. Upon these adjudications and the evidence before us it is very clear that the note upon which this action is brought was obtained from defendant by duress, and is for that reason void.

It is contended, however, that duress is a species of fraud, and that the defendant cannot rescind the contract for duress without first restoring to the plaintiff the benefits secured by making the contract. It is undoubtedly true that, if a party invokes the aid of equity to set aside a contract by virtue of which he has received a benefit, he will ²⁰⁰ be required to restore such benefit as a condition of obtaining such relief. This is upon the familiar principle of estoppel *in pais*. Thus, where a party affirms a contract in part, he is thereby estopped from disaffirming it as to the residue. "It is a doctrine," said Nelson, J., "when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak": *Van Rensselaer v. Kearney*, 11 How. 326. "In short, and in popular language," said Wilde, B., "a man is not permitted to charge the consequences of his own fault on others, and complain of that which he has himself brought about": *Swan v. North British Australasian Co.*, 7 Hurl. & N. 638. "The doctrine of estoppel *in pais* always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage": *Morgan v. Railroad Co.*, 96 U. S. 716.

The question recurs whether, upon the principles stated, the defendant has done any thing to estop her from defend-

ing against the note in suit. She is not here invoking the aid of a court of equity. She is simply resisting the enforcement of an executory contract on the ground that her signature to the same was procured by duress. As indicated, her defense, as appears from the record, is complete, unless her conduct has been such as to render it inequitable for her to make it. It certainly cannot be said as a matter of law, upon the record before us, that the defendant received any pecuniary benefit or consideration for signing the note in suit, or that she was in any way liable upon or on account of any of the notes surrendered by the plaintiff at the time she signed that note. If the evidence before us is true, then she signed that note for the sole purpose of saving her sick husband from arrest, prosecution, ²⁰¹ and imprisonment. The envelope containing the notes of \$800, and \$4,100, each signed "M. Kusworm," and the collaterals thereto, was not delivered by Gebhart to the defendant, but to Stone. Stone thereupon, in the presence of Gebhart, handed the same to the defendant, with the direction that she deliver the same to her husband. In pursuance of such direction she did deliver the same to her husband. If the evidence in the record is true, then that is all she ever saw of, or had to do with, that envelope or any of the notes thus contained therein. There is no evidence in the record that the defendant exacted, as a condition of her signing the note in suit, that Gebhart should surrender to her any of the notes so contained in that envelope, or that there was any agreement or understanding to that effect. Stone was a cousin of Mr. Kusworm, and apparently his friend; but there is no evidence that he was his agent, or had any authority to act for him, much less that he acted as the agent of the defendant. What he did in the matter was purely voluntary on his part, and as the result of his owning a mortgage with the defendant, as mentioned. Upon the evidence before us the legal effect of the transaction seems to be no different than it would have been had Mr. Kusworm been present, and Gebhart had delivered the envelope with the notes therein directly to him. Suppose such had been the facts, and Mr. Kusworm had immediately, in the presence of Gebhart, thrown the notes contained in the envelope into the fire and burned them up, would the defendant thereby have been estopped from making the defense of duress? In some of the cases cited the wife signed the con-

tract by the duress of her husband; nevertheless, it was held that her defense of duress was available.

There can be no such thing as estoppel *in pais*, except by reason of something said or done by the person estopped; certainly not by the independent act of another person, ²⁰² even though such other be her husband. The mere fact that the defendant delivered the package to her husband, as directed in the presence of, and acquiesced in by, the plaintiff's agent, does not make it inequitable for her to resist the enforcement of an executory contract which she signed only by reason of the plaintiff's duress. It is a well-recognized principle of law that, where a loss must be borne by one of two innocent persons, it shall be borne by him who occasioned it: *Karow v. Continental Ins. Co.*, 57 Wis. 61; 46 Am. Rep. 17, and cases there cited. If the two parties were equally innocent, yet if the notes contained in the envelope were destroyed by Mr. Kusworm without the privity of his wife, then it was in consequence of Stone's direction, with Gebhart's consent, that they should be delivered to him, and not that the defendant was the mere instrument of making such delivery. But the parties were not equally innocent. On the contrary, as appears from the evidence, the defendant was the victim of very cruel duress on the part of the plaintiff.

There seems to be a dearth of authorities upon the precise question here presented. In some of the numerous cases cited, and especially those in equity, restoration was made or tendered or made a condition of the judgment, while in others the question is not mentioned. In *Jordon v. Elliott*, 12 Week. Not. Cas. 56, the victim of the duress was induced to sign a receipt acknowledging the surrender of her son's note, and a policy of insurance on his life held by Jordan as collateral thereto, which he assigned to the defendant. Jordan burned the note in the presence of the defendant, but left the policy and the assignment thereof at her house. Of course, there could be no restoration of the note, and it does not appear that the policy was restored; but the supreme court of Pennsylvania affirmed the judgment in favor of the mother. There are numerous cases where duress or fraud has been made available as a ²⁰³ defense on the ground of recovering back money paid or setting aside contracts executed, without restoration: *Foss v. Hildreth*, 10 Allen, 76; *Manning v. Albee*, 11 Allen, 520; *Kent v. Bornstein*, 12 Allen, 342; *Chandler v. Simmons*, 97 Mass. 508; 93 Am. Dec. 117;

Brewster v. Burnett, 125 Mass. 68; 28 Am. Rep. 203; *Morse v. Woodworth*, 155 Mass. 233; *Higham v. Harris*, 108 Ind. 246; *Baldwin v. Hutchison*, 8 Ind. App. 454; *Dimmitt v. Robbins*, 74 Tex. 441; *Brown v. Peck*, 2 Wis. 261. In some of these cases there was a failure to return a lease of a claim, or a discharge of a former suit; in some, a failure to return a note and worthless securities; in some, a failure to return counterfeit bills; in some, a failure to restore money paid to a minor and by him wasted; in some, a failure to restore money or property paid or delivered to some person other than the victim of the duress or fraud. The rule seems to be stated fairly well by the late Mr. Justice Mitchell, of Indiana, in one of the cases cited, as follows: "If the results of a contract or settlement by which a party is sought to be estopped, or which is set up to prevent the assertion of a right, are such as to be of no benefit to one, or no detriment to the other, contracting party, that is, if nothing of value was parted with on the one hand or received on the other, the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony": *Higham v. Harris*, 108 Ind. 246, 254. Here the defendant received for herself no pecuniary benefit or thing of value. Should it be made to appear upon a trial that the defendant, as executrix of her husband's estate, actually received the notes contained in the package, or otherwise became a party to the destruction or conversion of them, a different question would be presented.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

From this opinion Justices WINSLOW and PINNEY dissented in an opinion written by the former, in which he said: "That an executory contract may be avoided or rescinded which has been made under the influence of such duress as the evidence here tends to prove is quite well established, and I shall spend no time on that question. The avoidance or rescission in such a case stands on the same ground as avoidance or rescission of a contract induced by fraud. Duress is, in fact, a species of fraud: *Cooley on Torts*, 2d ed., 592; *Reynolds v. Copeland*, 71 Ind. 422; 6 *Wait's Actions and Defenses*, sec. 12, p. 663. Logically and necessarily the same conditions will be imposed in a case of duress as in a case of the more common kinds of fraud. One of these conditions universally insisted upon is that the defrauded party must return, or offer to return, the consideration, if any has been received, or its equivalent, in case return of the specific consideration be impossible. Citation of authorities on this proposition seems unnecessary, and I content myself with one case in this court, where the rule is

well stated, with authorities: *Van Trott v. Wiese*, 36 Wis. 439-448. I know of no exception to this rule, at least as applicable to persons of full age and mental competency. It is true that, where a consideration has been received which is worthless or represents nothing of value, its return will not be required, because such return would be a mere idle ceremony. This is not an exception in fact to the rule, but rather a demonstration of the existence of the rule itself, because in such cases failure to return the consideration is always excused by the courts on the very ground that there is practically nothing to be returned, thus emphasizing the general rule. With deference, I say that most of the cases relied upon in the majority opinion as justifying the decision in this case are cases where the return of the consideration was excused because it was absolutely worthless.

"In *Foss v. Hildreth*, 10 Allen, 76, the party who was seeking to avoid a contract induced by fraud and duress did not return a discharge of a groundless action pending against him, and the court says that such return was not necessary, because 'the discharge is not property of any value to the defendant, nor is it of any use to the plaintiff.' It appeared in that case, also, that the plaintiff made the voidable contract while intoxicated, and the court remarks that, where a person *non compos* makes a deed and receives a valuable consideration for it, he may avoid it without first returning the consideration. *Manning v. Albee*, 11 Allen, 520, was an action of replevin for a quantity of clothing which Manning had been induced to trade to one French, in exchange for French's promissory note, with certain bonds as collateral. The bonds were represented as very valuable, but were in fact worthless. Albee afterward took possession of the clothing, claiming to have bought it of French, and French disappeared. Manning then ascertained that the bonds were worthless, and brought replevin for the goods against Albee, French not being found. The objection was made that the action could not be maintained without surrender of the note and bonds, but the court holds that to be unnecessary, because it appeared that French could not be found, so that the tender to him was impossible, and the defendant was in no event entitled to them. In *Kent v. Bornstein*, 12 Allen, 342, the return of a counterfeit bill was held unnecessary because it was entirely worthless. In *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117, it was held unnecessary for a minor, in avoiding his deed made during infancy, to return such part of the consideration as he has wasted or spent during minority, but the decision is placed upon the express ground that the consideration had been spent during minority, and the principle is recognized that, if he retained the consideration after becoming of age, he would affirm the contract. In *Brewster v. Burnett*, 125 Mass. 68, 28 Am. Rep. 203, the return of counterfeit bonds was not required, because they were entirely worthless. In *Morse v. Woodworth*, 155 Mass. 233, the plaintiff was not required to return a release given by defendant, because it was not property, and after rescission it became of no effect. In *Higham v. Harris*, 108 Ind. 246, it was held that, 'if nothing of value was parted with on the one hand or received on the other the contract may be disaffirmed without a formal restoration, on the principle that the law does not require an idle ceremony.' In *Baldwin v. Hutchison*, 8 Ind. App. 454, the return of an agreement not to prosecute the plaintiff was held unnecessary, because it was 'wholly valueless.' The case of *Dimmitt v. Robbins*, 74 Tex. 441, was a case where Dimmitt was attacked by armed robbers, who demanded a ransom. Robbins, who was present, pretended to give the robbers \$2,500 in an envelope for Dimmitt's release, and afterward sued Dimmitt for the \$2,500, as for money loaned. A judg-

ment in favor of Robbins was reversed, because the evidence did not show that the envelope contained \$2,500, and further, because the evidence showed that Robbins was a confederate of the robbers, which fact rendered void any contract such as claimed by Robbins. In *Brown v. Peck*, 2 Wia. 261, Brown was excused from returning the \$100 which it was claimed he had received, because in fact he never received it. The court says: 'There was in fact no valid, legal payment made, nor any received.' The money was left in the hands of one Leland, and never came into the possession of Brown.

"The foregoing cases seem to be relied upon in the opinion of the court as justifying in some way the proposition that a contract may be rescinded without return of the consideration. As a matter of fact, it is apparent that not one of them sustains the proposition that, where any thing of value has been received under a contract, rescission can be had without return of such value, except, perhaps, in the case of a minor or a person *non compos mentis*. The case of *Jordan v. Elliott*, 12 Week. Not. Cas. 56, is still more unfortunate as an authority. It is said in the majority opinion that in that case a policy of insurance, and the assignment thereof, were left at defendant's house, and that it does not appear that the policy was restored. My reading of this case convinces me that the defendant never received any thing. It is true she signed a receipt acknowledging that she had received her son's note and policy of life insurance and assignment thereof, but the opinion of the court expressly holds that this receipt was obtained by fraudulent representations as to its contents, and that at the same time the defendant refused 'to receive either the note or the policy'; and in another place they are referred to as a 'valueless consideration, which she (defendant) refused to accept.' How this case supports the view of the majority of the court I leave for others to say.

"In the present case there is absolutely no question but that Mrs. Kusworm received from the bank, in consideration of her note and mortgage, a large amount of negotiable securities. According to the testimony of the witness Stone (which is uncontradicted), Mr. Gebhart handed to him (Stone), when he received Mrs. Kusworm's note, two notes of \$4,100 and \$900, respectively, signed 'M. Kusworm,' together with four or five collateral notes signed by other persons and aggregating \$7,000 or \$8,000 which were collateral to the M. Kusworm notes. All of these notes Mr. Stone immediately passed over to Mrs. Kusworm. There was no claim or proof that all of the notes were forged or worthless. The utmost claim made by Gebhart was, according to Mrs. Kusworm's own testimony, 'I have notes here for \$4,900, which your husband has forged.' Granting this to be true, there were still notes aggregating \$7,000 or \$8,000 which were genuine and valuable securities, which passed into Mrs. Kusworm's hands as a consideration for the notes which she now seeks to avoid. The effect of the decision of the court is that she may avoid her own contract without accounting for or returning the consideration thereof, and without showing it to be worthless. I think this is contrary to all the law on the subject. It is said that she received no pecuniary benefit from it, because she turned all the notes over to her husband. Still, the bank parted with it, and, according to the rule laid down by Mr. Justice Mitchell, quoted with approval in the majority opinion, in order to justify rescission without restoration, there must have been 'nothing of value parted with on the one hand or received on the other.' But there was value received by Mrs. Kusworm. The fact that she turned them over to

her husband, according to Stone's advice, surely cuts no figure. Stone was not the agent of the bank in any sense. He was simply the friend of Mrs. Kusworm. The sum and substance of the matter is that she voluntarily, on the advice of a friend, turned the notes over to her husband, and thus disabled herself from returning them. Was it ever held that a person, by voluntarily destroying a consideration received, or placing it in the hands of a third party, could relieve himself from the necessity of returning it or its value in case of rescission? I have yet to see the case which holds such a doctrine. There seems to me no element of estoppel here as against the bank resulting from the fact that Gebhart heard Stone direct Mrs. Kusworm to turn over the notes to her husband, and said nothing. The notes had passed entirely beyond the bank's control. Gebhart had received Mrs. Kusworm's note and mortgage as full and complete satisfaction for the bank's right and interest in them. She could do as she pleased with them, and the bank could say neither yea nor nay. There was no duty then resting upon Gebhart to speak, and consequently no estoppel from his failure to speak.

"The net result seems to be, from the conclusions reached by the court, that the plaintiff loses, without possibility of recovery, the notes of M. Kusworm, and the collaterals which it lawfully held thereto, as well as the note and mortgage of Mrs. Kusworm. Against such a result I respectfully protest."

COMPOUNDING FELONY.—A mortgage given to suppress a criminal prosecution is void: Note to *Morrill v. Nightingale*, 27 Am. St. Rep. 212. A note given to settle an agent's embezzlement is valid if there is not an agreement to stifle the prosecution: See *Miller v. Minor Lumber Co.*, 98 Mich. 163; 39 Am. St. Rep. 524, and note.

DURESS—THREATS OF IMPRISONMENT.—In relation to husband and wife, parent and child, each may avoid a contract induced and obtained by threats of the imprisonment of the other; and it is of no consequence whether the threat is of lawful or unlawful imprisonment. The principle which underlies all this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the conduct and interest of another, contracts thus made will be set aside: *Adams v. Irving Nat. Bank*, 116 N. Y. 606; 15 Am. St. Rep. 447.

EQUITABLE ESTOPPEL—HOW ARISES.—To create an equitable estoppel the person sought to be estopped must do some act or make some admission to influence the conduct of another, which is inconsistent with his present claim, and the other party must have acted on the strength of such act or omission. Equitable estoppel depends upon the facts and circumstances of each particular case: *Terrell v. Weymouth*, 32 Fla. 255; 37 Am. St. Rep. 94, and note.

WHEN ONE OF TWO INNOCENT PERSONS MUST SUFFER, he whose fault, neglect, or accident has caused the loss must bear it: *Caldwell v. Neil*, 21 La. Ann. 342; 99 Am. Dec. 738, and note; *Beach v. Schoff*, 28 Pa. St. 195; 70 Am. Dec. 122; *McCoy v. Morrow*, 18 Ill. 519; 68 Am. Dec. 578; *Ridgway's Appeal*, 15 Pa. St. 177; 53 Am. Dec. 586.

GOODMAN v. BAERLOCHER.

[88 WISCONSIN, 287.]

MECHANIC'S LIEN—DESTRUCTION OF BUILDING BEFORE COMPLETION.—Materialmen and laborers are not entitled to a mechanic's lien on land for materials furnished or labor performed on a building thereon destroyed before its completion.

MECHANIC'S LIEN—FILING AND DOCKETING CLAIM.—The right to a mechanic's lien is secured by delivering a claim therefor to the proper officer, within the time prescribed by statute, and leaving it with him to be filed. Such right is not prejudiced by the officer's failure to perform his duty, as docketing the claim is not a prerequisite to securing the lien.

ACTION to enforce mechanic's liens for materials furnished and labor performed for the defendants and original contractors, Gross & Heimer, in the construction of a building for the defendant and owner, Baerlocher. The building was to have been completed by August 8, 1891, but, with the exception of the foundation, consisting of piles driven in the ground, the building was, on July 16, 1891, blown down and destroyed, when it was about two-thirds completed. On August 5, 1891, Gross & Heimer again commenced the construction and erection of the building mentioned in the contract, on the same foundation, and under the same contract, and continued work until November 15, 1891. Before any of the claims for liens on the several demands in this action had been filed the defendant, Baerlocher, had paid the contractors, Gross & Heimer, or on their account, the full contract price for the building. There were five several claims consolidated in the action. Most of the claims, among them that of Goodman, Wilcox & Co., were for materials furnished and used in the first or destroyed building. The others were for materials furnished and used in the second building. The claim of J. B. Noyes & Co., was for a balance for lumber and materials that went into the second building. This claim was deposited for filing with the clerk of the proper court on November 20, 1891, but being folded inside of another claim, a fact not noticed by the clerk, it was not indexed or marked filed until May 24, 1892. This claim was found by the trial court to be valid. The court below found, as a conclusion of law, that the destruction of the first building did not cut off the liens on the premises upon which such building was situated, for indebtedness accrued for material and labor in its construction, and that all the claimants were entitled to

liens. Judgment was rendered accordingly, and the defendant, Baerlocher, appealed.

W. E. Hoehle, J. P. Geiser, and D. E. Roberts, for the appellant.

Ross, Dwyer & Hanitch, John Brennan, and Swift, Murphy & Bundy, for the respondents.

219 PINNEY, J. 1. The original contractors, Gross & Heimer, had not performed their contract when the first building, being in an incomplete condition, was destroyed. It had not been delivered to or accepted by the owner, and was therefore at the risk of the contractors, and the destruction of the building did not excuse them from performing the contract: *Dermott v. Jones*, 2 Wall. 1; *Adams v. Nichols*, 19 Pick. 275; 31 Am. Dec. 137; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *School Trustees v. Bennett*, 27 N. J. L. 515; 72 Am. Dec. 373. In *Tompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349, it was held that the owner of the lots might recover back from his contractor payments in such case which he had made on account of the building. In this case the building had not only not been completed, but it had been utterly destroyed, so that the owner of the ground had received no benefit from the materials and work and labor employed in attempting to build it, and the original contractors could not have recovered any thing or enforced **222** a lien for what had been furnished or done in attempting to construct and erect the building. Whether the subcontractors or materialmen and laborers under the contractors are in any better situation, is the question to be determined.

Section 3314 of the Revised Statutes provides that: "Every person who as principal contractor, . . . performs any work or labor, furnishes any material, . . . in or about the erection, construction, . . . of any dwelling-house, building, . . . shall have a lien thereon, and upon the interest of the owner of such dwelling-house, building, . . . in and to the land upon which the same is situated, . . . not exceeding in extent," etc. And section 3315 extends the right to "every person who, as subcontractor of a principal contractor, or employee of any contractor or subcontractor, performs any work or labor for, or furnishes any materials to, a principal contractor or subcontractor in any of the cases mentioned in the preceding section," if within sixty days

thereafter he gives the specified notice in writing to the owner, or his agent, of the property to be affected by such lien, "with a statement of the labor performed or materials furnished, and the amounts due from such principal contractor or subcontractor, and that he claims the lien given" by chapter 143 of the Revised Statutes.

The lien provided by the statute is "in the nature of a charge on land given by statute to the persons named therein to secure a priority or preference of payment for the performance of labor or supply of materials to buildings or other improvements, to be enforced against the particular property in which they have become incorporated, in the manner and under the limitations therein expressly provided": Phillips' Mechanics' Liens, sec. 9. In *Van Stone v. Stillwell & B. Mfg. Co.*, 142 U. S. 128, 136, it was said, in substance, that the lien is given to secure priority of payment of the price and value of work performed and the materials furnished; that "it is the use of the materials furnished²⁹³ and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the materialman or laborer his lien under the statute." The object is not only to encourage building, but to afford the contractor, materialman, or laborer security upon and against the property of the owner materially increased in value by the materials and labor wrought into it, and so rests upon the strongest equitable basis, for the building becomes a part of the realty, and it is the principal matter, to which the lien on the realty seems to be an incident, and without which the lien on the building would be fruitless or of little value. In *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, 175, in which the remedy given by this statute to subcontractors, laborers, and materialmen were considered, it was said: "The theory of the law giving to laborers and materialmen specific liens upon the property upon which their labor was performed or their materials used seems to be that, because the value of such property has been enhanced thereby, it is just that the property should be specifically charged with the sums expended thereon for those purposes. The reason of the law extends to expenditures on the property by subcontractors as well as by those who contract directly with the owner." And the cases of *Munger v. Lenroot*, 32 Wis. 544, and *Winslow v. Urquhart*, 39 Wis. 260, really rest upon this ground.

In this case the defendant, Baerlocher, the owner of the

lots, has received no benefit whatever from the material and labor in question, and the principal contractors were clearly not entitled to any compensation for them nor to any lien on the lots on that account. This case is not, we think, within the statute relied on, for the statute does not extend to the case where no building is erected or constructed, and no benefit has passed to, or been accepted by, the lot-owner. To apply the statute so as to extend its provisions to such a case as the present would, we think,²⁹⁴ be giving it not merely a liberal, but a most latitudinarian and unreasonable, construction, and to mistake the incident as the subject of the lien for the principal thing which gives increased value to the ground upon which it has been erected, and would require the lot-owner to answer through his property for the materials and labor that had entered into the building destroyed, from which he has not, and could not, derive any benefit, and would leave him without any remedy whatever against the principal contractor; making him practically an insurer of property over which he had not acquired control, and which remained at the risk of the contractors. If the second building shall be destroyed before its completion it might thus transpire that the lot-owner, according to the respondents' contention, might be wholly deprived of his lots without any fault of his own, and without having received any benefit or compensation therefor whatever.

Under a statute in Pennsylvania not materially different from the one in question it has been held that the lien on the building is the principal thing, and the lien upon the land on which it is situated is an incident of the completion of the building, and that when the building is destroyed, by fire or otherwise, before completion, there can be no lien against the land on which it was attempted to erect it; that the lien shares the fate of the building; and that the reason for binding the land ceases with the destruction of the building: *Presbyterian Church v. Stettler*, 26 Pa. St. 246; *Wigton's Appeal*, 28 Pa. St. 161; *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238, 246. This view is sustained by *Coddington v. Beebe etc. Dry Dock Co.*, 31 N. J. L. 477, 480, where it is said: "The act did not intend to give a lien on labor not performed on the land upon which it is to be a lien, nor on lumber before it was made land. . . . As soon as the lumber is converted into land, then the land is seized by the lien by reason of the building, and²⁹⁵ the building because it is

a part of the land; and from thence it follows that if the land and the building, by any chance, becomes separated, the lien is lost on both—the land, because it has lost the building and the increased value thereby given to it, and the building, because separated from the land”: Houck on Liens, secs. 203–205; *Schukraft v. Ruck*, 6 Daly, 1. A different view, however, has been taken of the question by the courts of other states having statutes more or less similar to our own: *Freeman v. Carson*, 27 Minn. 516; *Gaty v. Casey*, 15 Ill. 189; *Steigleman v. McBride*, 17 Ill. 300; *Clark v. Parker*, 58 Iowa, 509.

The statute (sec. 3315), as it existed before the amendments thereto noted in Sanborn and Berryman's Annotated Statutes, section 3315, provided that “in no case shall the owner be compelled to pay a greater sum for or on account of such house, building, or other improvement than the price or sum stipulated in the original contract or agreement.” It was then amended (Laws of 1885, c. 312; Laws of 1887, c. 535), so that if the price shall be fixed unnecessarily low, with intent to defraud subcontractors, the basis of the owner's liability shall be a fair price for the labor and materials used in the building, instead of the contract price. The next enactment (Laws of 1889, c. 333), repealed the above restriction upon the liability of the owner, and makes him absolutely liable to such contractors as comply with the requirements of the law, for the amount of their claims, without regard to the contract price of the building, or the sum the owner may be indebted to the contractor when notice of the subcontractor's claim for a lien is served, or at any other time: *Hall v. Banks*, 79 Wis. 233; *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 174, 175. The operation of the amendment of 1889 seems to be confined to the question of the amount for which a subcontractor, materialman, or laborer under him may have a lien against the building and premises of the ²⁹⁶ owner, and does not in any manner affect the question as to what may or may not wholly defeat or deprive him of any lien at all.

As already observed, it is very clear that the principal contractors in this case would not be entitled to recover or have a lien by reason of the partial construction of the building destroyed, and if the case is such that the principal contractor is not entitled to a lien for any other reason than that he has been paid in full, as in case of abandonment of his

contract, or of destruction of the building before completion, the subcontractors under him, and their materialmen and laborers, would not seem to be entitled to any lien. The law was so held in *Malbon v. Birney*, 11 Wis. 107, 110, where it was held that one who had furnished lumber to a principal contractor, which he had used in the construction of the building, and had voluntarily abandoned his work, could not recover against the owner as a subcontractor under such principal contractor by virtue of the lien law, and it was said that "if Kennedy [the contractor] could not have recovered on a *quantum meruit* for his labor and on a *quantum valebant* for the materials, the respondents [the materialmen] ought not to sustain this action." And it seems clear that the rule must be the same where the building has been wholly destroyed before completion. That the rule in *Malbon v. Birney*, 11 Wis. 107, has not been affected by the amendment by chapter 333 of the Laws of 1889, of section 3315 of the Revised Statutes, seems obvious from an inspection of its language, making it the duty of the principal contractor to defend any action brought to enforce a lien by any subcontractor or materialman or laborer under him at his own expense, and that, "during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien shall be filed, and, in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any ²⁹⁷ amount due from him to the contractor the amount of such judgment and costs, and, if he shall have settled with the contractor in full, shall be entitled to recover back from the principal contractor any amount so paid by the owner, for which the principal contractor was originally liable." The provision in question is plainly restricted to a case such as was before the court in *Mallory v. La Crosse Abattoir Co.*, 80 Wis. 170, where the building had been completed, and where the controversy was as to the liability of the owner to pay, through his property, the sums due from the principal contractor to his subcontractors, materialmen, or laborers, although in excess of the contract price for erecting the building. Its entire scope is restricted to allowing the owner to deduct from the contract price due and unpaid by him to his contractor the amount of the judgment and costs recovered against the latter, and, if he shall have settled with the contractor in full, he is allowed to recover back from the principal contractor any amount so paid by him, for

which such principal contractor was originally liable. We hold, therefore, that, by reason of the destruction of the first building before completion, the several claimants plaintiffs, who are materialmen and laborers, are not entitled to liens on the lots for materials or for work and labor used and expended on such building; that those who furnished materials and performed work and labor on the second building are entitled to liens therefor on that building, and upon the right, title, and interest of the owner, Baerlocher, therein.

2. There is no preponderance of evidence against the finding of the court adverse to the defense set up by the appellant to the claim of Noyes & Co., and hence there is no ground for disturbing the finding on that subject.

3. The objection that the claim of Noyes & Co. for a lien was not seasonably filed is, we think, untenable. It was delivered in due form to the proper officer to be filed. His failure to put his file mark on it, and to make the docket entries on the docket of mechanics' liens within the prescribed six months for filing liens, will not defeat the claim. The statute provides for both filing and docketing the claim, and these are entirely different things. The law requires the party to file his claim for a lien, and the clerk is to docket it: Rev. Stat. secs. 3318, 3319. And section 3321 is that "any person having so filed such claim," etc. The rights of the claimant to a lien are secured when his claim therefore is delivered to and left with the clerk to be filed. The statute requires him to file it and to docket it. The first part of the section provides that within six months, etc., it "shall be filed as hereinafter provided," and in the latter part that "such claim for lien may be filed and docketed within such six months, notwithstanding the death of the owner of the property affected by it," etc.; and this is the "hereinafter provided," and satisfies the previous requirement of the section, for there is no other provision in the statute to which it can possibly apply. It certainly does not refer to docketing the claim. When the claimant has delivered his claim for a lien to the clerk, and left it with him to be filed, he has done all he is required to do—all he possibly can do—to secure his rights, and he will not be prejudiced by the neglect of the clerk to perform, in respect to it, his duty as directed by the statute. Docketing the claim is not a prerequisite to securing the lien: *Smith v. Waggoner*, 50 Wis. 155; *Gorham v. Summers*, 25 Minn. 81;

People v. Bristol, 35 Mich. 28; *Bishop v. Cook*, 13 Barb. 329; *Dodge v. Potter*, 18 Barb. 193.

By the COURT. The judgment of the circuit court is reversed, and the cause remanded, with directions to enter judgment according to this opinion.

A PAPER IS FILED when it is delivered to the proper officer and by him received to be kept on file. The file marks are but evidence of its having been filed. The duty of filing usually includes that of putting on such marks: *County Commrs. v. State*, 24 Fla. 55; 12 Am. St. Rep. 183. The failure of the officer to do his duty does not affect the validity of the filing: *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288, and monographic note thereto showing what constitutes a filing of papers and evidence thereof.

RIGHT TO MECHANIC'S LIEN WHEN, WITHOUT FAULT OF THE OWNER, THE BUILDING IS NOT COMPLETED.—The decisions of the courts are not entirely harmonious upon the question as to what will, or will not, defeat a claim of lien by a subcontractor, materialman, or laborer, where there is a failure to complete the building according to the terms of the contract. A mechanic's lien, however, is a creature of the statute, and upon principle, as well as authority, the lien or right of the subcontractor and others is always in strict subordination to the terms of the original contract between the owner and his immediate contractor: *Dingley v. Greene*, 54 Cal. 333; *Roylance v. San Luis Hotel Co.*, 74 Cal. 273. It is evident, too, that the right to a lien, in any particular case, depends upon the wording of the statute. There may be a failure to complete the building because it was not built according to the terms of the contract, or within the time therein specified; or because of its severance from the freehold, or removal, or destruction by fire, wind, or water before completion; or because it was abandoned by the contractor before completion. It is clear, however, with respect to abandonment, that the right of a materialman to a mechanic's lien depends on whether he furnished material on the credit of the structure of which it was to form a part, and whether it was of the kind and quality specified in the contract of the owner with the builder; and does not depend on the conduct of the builder after the materials have been furnished. The abandonment of the contract by the builder will not, in such a case, deprive the materialman of his lien: *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238.

PRESERVATION OF LIEN UPON ABANDONMENT OF WORK—WORK IS COMPLETED, WHEN.—Parties intending to assert liens rather than rely upon the personal credit of the debtor must be vigilant to ascertain when the work is completed or abandoned, and not be too early or too late in filing their statements, because the premature filing of a statement for a lien on a building is as ineffective as one filed after the statutory limitation has expired. In determining the perplexing questions which often arise as to when a work is completed or abandoned, "the court should not take a technical and narrow view, but should save to parties entitled to liens any rights they may justly have, under a fair and equitable construction of the facts and the law applicable thereto." And it would seem to be inequitable and unreasonable, and contrary to the spirit of the law, to hold that parties are absolutely barred of all rights to the lien law where the work is permanently stopped or abandoned without fault of such parties, as such a com-

struction would place materialmen and laborers "at the mercy of the dishonesty, fickleness, or misfortunes" of the owner or contractor. It has, therefore, been held that, in case of abandonment of the enterprise, the building is to be deemed completed, so far as concerns the rights of the parties not in fault, to file and assert their liens: *Catlin v. Douglass*, 33 Fed. Rep. 569; *Shaw v. Stewart*, 43 Kan. 572; *Reed v. Norton*, 90 Cal. 590. And there is no question as to the justness of such a rule if the abandonment was caused either by the consent or fault of the owner: *Shaw v. Stewart*, 43 Kan. 572. The time of presentation of the claim is material under a statute prescribing when it must be presented. If such time is fixed at ten days after the "job or contract" let by the owner "shall have been fully completed" the time allowed for presenting the claim must be computed from the completion of the work under such contract, as its completion need not be the completion of the contemplated improvement. It may be that only a part of the whole work has been let, or that the completion of the structure is not in present contemplation. If the principal contractor abandons his contract the work under it must be regarded as completed within the meaning of the statute, else the subcontractor could not enforce his lien at all when the owner has seen fit to pay off the contractor. But in such a case the subcontractor must present his claim within ten days after such abandonment, and cannot postpone the presentation until the work is completed under a new contract with a stranger to the first one, or is completed by the owner himself: *Basham v. Toors*, 51 Ark. 309.

With reference to the completion of the building, the contractor and subcontractor should be considered as substantially one and the same person, as between them and the owner of the property. The building, therefore, should be considered as completed when, and only when, the contractor has completed his part thereof. "No privity of contract," says Valentine, J., in *Davis v. Bullard*, 32 Kan. 234, 237, a case involving the premature filing of a statement for a mechanic's lien, "exists between the owner of the building and the subcontractor; but the subcontractor's rights are based simply and solely upon his contract made with the contractor. The contractor, and not the owner of the building, is the subcontractor's debtor, and the subcontractor has no right to claim that the building has been completed, until the contractor under whom he claims has such right. Under the contract between the owner and the contractor the owner agrees to pay the contractor a certain sum for constructing the building, and this sum is a fund which may be held under the statutes for the payment, so far as it will go, of all the claims of all the various subcontractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund and get their proportionate shares thereof, at the same time, or within the same period of time. Besides, one subcontractor ought not to be able to reach this fund and appropriate it to the extent of his claim before another subcontractor can reach it; for, if the fund should not be sufficient to pay the claims of all the subcontractors, then each subcontractor should be paid only a proportionate share thereof. Now, the amount of all the claims of all subcontractors can be ascertained only after all the work and materials have been furnished, and after the building has been completed so far as the contractor is required to complete the same; for the whole of the work may in fact be done by subcontractors only, or the last item of work performed or materials furnished may be performed or furnished by a subcontractor. The building, in such a case, would be com-

pleted by a subcontractor; and the subcontractor completing the building or furnishing the last item of work or material therefor is entitled to his proportionate share of the general fund equally with the subcontractor who furnished the first item of work or material, or any intermediate portion thereof. Of course, when the contractor has furnished, through himself or his subcontractors, all the work and material which he had agreed to furnish, then the building is completed, so far as he is concerned, and is also completed so far as all the subcontractors under him are concerned; and the contractor and each of the subcontractors may then file their respective statements for liens, and each will then become entitled to his proportionate share of the fund. If, however, the contractor should abandon the work for any cause before completing the building under his contract, it is possible, and even probable, that the subcontractor may then, if not inequitable, consider the building as completed, and obtain liens thereon within four months thereafter by complying with the provisions of sections 631 and 632 of the Civil Code. But so long as the contractor has not completed the work under his contract, but is still at work on the building under his contract, the building cannot be considered as having been completed, either as to the contractor or any subcontractor."

COMPLETION OF BUILDING BY OWNER AFTER CESSATION OR ABANDONMENT OF WORK.—The California statute makes the cessation from labor for thirty days upon any "unfinished contract" equivalent to a "completion" thereof, for all who claim a lien by virtue of that contract, as fully as though the building was actually completed: *Kerckhoff-Cuzner Mill etc. Co. v. Olmstead*, 85 Cal. 80; *Willamette Steam etc. Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229. It is immaterial whether the building is subsequently completed by the owner or not, or, if completed, whether such completion is effected by the owner directly, or through a contract with another. For the purposes of creating a lien thereon through the terms of the unfinished contract, the cessation from labor under that contract for thirty days is a statutory completion of the building which sets the time running within which the claim of lien must be filed. The claim, under such circumstances, must be filed within thirty days after such time commences to run, although it be filed within thirty days from the actual completion of the building: *Kerckhoff-Cuzner Mill etc. Co. v. Olmstead*, 85 Cal. 80; *Johnson v. La Grave*, 102 Cal. 324, modifying *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332, holding that the abandonment of work upon a building, by a contractor, before its completion does not necessitate the filing of a lien within thirty days thereafter if the owner goes on with the work, and does not occupy or accept the building. A subsequent contract by the owner, after an abandonment of the original contract, for the completion of the work is as disconnected from the original contract as if it were for the construction of a different building. Hence, if the original contractor under a building contract gives to the owner of the building written notice that he abandons the contract, and that he declines to proceed further in its execution, and thereafter does no work upon the building, whereupon the owner contracts with another builder to complete the building, it is necessary for those claiming mechanics' liens by virtue of the original contract to file them within thirty days after there has been a cessation from labor for thirty days upon the finished contract. If the rights of materialmen to enforce a lien upon a building have been lost by a failure to file their claims of lien in time it is immaterial to them or to their assignee whether any portion of the moneys due to the contractor was unpaid at the time he had entered

into the contract, or whether the owner made a proper disposition of the unpaid portion of the contract price: *Johnson v. La Grave*, 102 Cal. 324. The question as to actual completion or a cessation of work for thirty days is one of fact: *Willamette Steam etc. Co. v. Los Angeles College Co.*, 94 Cal. 229; *Marble Lime Co. v. Lordsburg Hotel Co.*, 96 Cal. 332.

A mechanic's lien does not necessarily depend on the right of the contractor to collect the sum of money himself from the owner. It covers the value of the building at the time of the filing of the lien; and all the liens must not exceed the contract price: *Graf v. Cunningham*, 109 N. Y. 369; *Van Clief v. Van Vechten*, 55 Hun, 467. A subcontractor's right to a lien is not necessarily defeated by the contractor's abandonment of the work, and the owner may be held liable for a balance due. Thus, it has been held that there is no provision in the mechanics' lien law of New York, passed in 1885, which directly or inferentially requires the contract to be fully performed as regards a lien for work and materials furnished and used by a contractor in the erection of a building, if it is shown that, at the time the lien was filed, a sum of money had been earned by the contractor, according to the agreed price, which exceeded all payments theretofore made by the owner in an amount sufficient to pay the claim for which the lien is filed; and that the owner is liable to a subcontractor to the extent of "the price stipulated and agreed to be paid on such contract and remaining unpaid at the time of filing such lien": *Wright v. Roberts*, 43 Hun, 413. Hence, if a materialman files his lien when nothing is due the contractor, who afterward abandons his contract without just cause, and the owner completes the building for less than the contract price, under a provision of the contract authorizing it, and stipulating that the cost should be deducted from the contract price, the lien attaches to the extent of the difference between the cost of completion and the amount unpaid on the contract when the lien was filed: *Van Clief v. Van Vechten*, 55 Hun, 467. The mere fact, however, that the completion of work abandoned by a contractor, when nothing is due him, may cost some thing less than the amount of the contract price unpaid, for the entire work, does not necessarily support the claim of a materialman for materials furnished to the contractor, if, at the time the lien is filed, there is nothing due the contractor from the owner and, before any further sum becomes due under the contract, the contractor abandons the work and refuses to go on with it, and there is no provision in the contract for the completion of the work by the owner in case of the contractor's failure to perform, nothing remains "unpaid" within the meaning of the mechanics' lien law so as to make the notice of the lien effectual, to charge the premises with the claims of lienors who have done work or furnished materials. And this is so although the cost of the work necessary to complete the contract and remaining undone would be less than the balance unpaid of the contract price for the entire work: *Larkin v. McMullin*, 120 N. Y. 206.

CONTRACTOR'S FAILURE TO COMPLETE BUILDING—GENERAL EFFECT OF. The law does not allow a contractor, mechanic, or materialman to violate a contract and claim a lien for work done, because of an apprehension or fear that he will not receive his pay at the time for payment. If he quits work under such circumstances the owner's real estate cannot be subjected to a lien even for the work already done, as there has not been "a compliance with his contract by the person claiming the lien," which is a prerequisite to the attaching of the lien: *Rome Hotel Co. v. Warlick*, 87 Ga. 34, 43. A materialman's right to a lien, as against the owner, for materials

furnished the contractor, depends for its existence upon the fact of an indebtedness from the owner to the contractor at the time of or subsequent to the notice. If, therefore, the contract for the erection and completion of the building is entire, and the contractor is to be paid as the work progresses, but he abandons it before it is completed, he loses the right which he would have had to the full compensation agreed upon, although the owners may complete the building for less than the difference between what they have agreed to pay and what they have paid. The court will not speculate as to this matter. In such a case, if the owner reserves a certain per cent of the contract price until the building is completed, and the contractor abandons the work before completion, but, after collecting all that is due him, except the stated percentage, one who has furnished the contractor with materials has no lien as against the owner: *Blythe v. Poultney*, 31 Cal. 234. It is evident from this that the materialman should have some protection against the act of the owner in making payments so as to defeat his lien. This protection has been afforded by section 1183 of the California Code of Civil Procedure, providing for the filing of building contracts with full information as to details. If the original contractor fails to perform his contract, or if he has performed it in part, and there is no money due to him according to its terms, or if, having performed it, he has been fully paid by the owner according to the contract, before notice of the lien, neither he nor his employees are entitled to enforce a lien upon the property: *Dingley v. Greene*, 54 Cal. 333, 335. But, if the employer, under the terms of a building contract, is to pay in installments as specified portions of the work are completed, and the contractor earns some of them, a materialman who has furnished material for the work done, and complied with the mechanics' lien law, is entitled to a lien, although the contractor afterward abandons his contract before completion thereof: *Whittier v. Blakely*, 13 Or. 546. So, under the mechanics' lien law of New Jersey, when a notice as to the amount due for work done is given to the owner, he must hold a sufficient amount of the moneys then due, or thereafter to become due, the contractor, to answer the notice, and, although the contract is never completely executed, if the contractor is in a position which enables him to recover from the owner in an action either upon the contract or upon a *quantum meruit* for contract work done, a notice will reach the amount so recoverable: *Mayer v. Mutchler*, 50 N. J. L. 162.

If the lessee of premises agrees to erect a building thereon and abandons it before completion, the building will revert to the owner free from any liability for a lien for materials furnished or labor performed where neither he nor his agent created the debt, as there is a failure on the part of the lessee to comply with the terms of the lease and perform his contract: *Cornell v. Barney*, 26 Hun, 134. The cancellation of a building contract does not affect liens already attached: *Jenks v. Brown*, 66 N. Y. 629. Neither is a builder's lien waived by the fact that the original contract has been changed in small particulars by mutual consent, and the time for completing it extended: *Montandon v. Deas*, 14 Ala. 33; 48 Am. Dec. 84.

RECOUPMENT OF DAMAGES BY THE OWNER.—The fact that a building is not completed according to contract does not necessarily deprive a contractor or subcontractor of his right to enforce a mechanic's lien against the building, in the absence of a statute so limiting the right. The mechanic or material man must establish his account, and the lien attaches for the amount found to be due thereon. But the owner of the building is entitled to set up as a counterclaim any damages he has sustained by reason of the breach

of the agreement, and the lien attaches for the amount actually due, after deducting such damages: *Millsap v. Ball*, 30 Neb. 728; *Mehrle v. Dunns*, 75 Ill. 239; *Lind v. Braender*, 15 Daly, 370. The owner is entitled to show how much of the work remains undone, what it will cost according to the contract to complete it, and to have such amount deducted from the contract price: *Lind v. Braender*, 15 Daly, 370; *Mehrle v. Dunne*, 75 Ill. 239. If a builder abandons work under a contract providing that the owner shall, after three days' notice, have the power to finish the work and deduct the expense from the amount of the contract, and the owner elects to go on under this clause of the contract, he waives the right to insist upon a forfeiture for the failure of the contractor to perform the contract. He is not thereafter precluded from claiming damages against the contractor for defective performance, or for failure on his part to complete the building at the time specified. These damages he may recoup against any sum due the contractor for work done under the contract. But he cannot avail himself of the right, given him by the contract, to complete the work, thereby substituting himself in place of the contractor, and at the same time claim that the contract was at an end, and refuse to account to the contractor for work done under it, on the ground that the contract was forfeited. The election to do the work at the contractor's expense, under the clause referred to, assumes that the contract was then in force: *Murphy v. Buckman*, 66 N. Y. 297, per Andrews, J.

DESTRUCTION OF BUILDING.—As indicated in the principal case, there is a line of authorities holding that the lien shares the fate of the building, and that the reason for binding the land ceases with the destruction of the building, whether occasioned by fire, wind, or water: *Presbyterian Church v. Stettler*, 26 Pa. St. 246; *Wigton's Appeal*, 28 Pa. St. 161; *Schukraft v. Ruck*, 6 Daly, 1. These decisions are based upon the theory that the object of the mechanic's lien law is to encourage improvements, and that, if a lien were held to remain upon the land after the improvements had been destroyed or removed, it would discourage the improvement of the land, and so operate to defeat the object of the law. And in *Schukraft v. Ruck*, 6 Daly, 1, the court went so far as to hold that, if the law gave a lien upon the building and upon the land, and the building was blown down before notice of lien was given, there could be no lien because no building remained. We fail to understand why a destruction of part of the subject matter of the lien should affect what was left, namely, the land. Even in Pennsylvania, where the lien goes down with the building, it has been held in a comparatively late case that a mechanic's lien upon a whole manufacturing plant for material furnished for the construction of one of the buildings of the plant is not lost by the destruction of the particular building for which the material was furnished: *Linden Steel Co. v. Rough Run Mfg. Co.*, 158 Pa. St. 238. So, where the lien attaches to the land as well as to the building, especially where this is so by virtue of express statutory provision, and the lien rests alike upon both, it ought logically to remain upon the land after the improvements have been destroyed or removed. And this view promotes another object of the mechanic's lien law, which is "to provide security for a class of persons whose claims gradually accumulate from day to day, and who cannot conveniently protect themselves in any other way." The cases from several states support this doctrine. Thus, in Illinois, a mechanic's lien for materials furnished or work done upon a building is not alone upon the specific thing furnished, but exists as well against the land. Therefore, the lien exists against the land, although the

entire materials, buildings, and improvements on account of which the lien accrued are removed, rendered worthless, or destroyed by accident: *Gaty v. Casey*, 15 Ill. 189; *Steigleman v. McBride*, 17 Ill. 300; *Schwartz v. Summers*, 46 Ill. 18; *Sontag v. Brennan*, 75 Ill. 279. In the case last cited a workman was performing labor and furnishing materials under a contract to do the carpenter's work, only, of a building, the risk of destruction by fire being upon the owner. The workman was prevented by fire, without fault on his part, from completing his contract, but the court refused to disturb a decree giving him a lien on the lot for the sum due him for work and material. So in Iowa and Texas the lien will exist upon the land alone, after the improvements have been destroyed or removed: *Clark v. Parker*, 58 Iowa, 509; *Stuart v. Broome*, 59 Tex. 466. And in Minnesota, where the lien attaches, by virtue of the statute, not only to the building, but to the owner's interest in the land, it is not terminated by a destruction of the building by fire after the materials have been furnished and the labor performed, but before the "account" provided for by the statute is filed for record; but may, nevertheless, be enforced against the land on which the building stood: *Freeman v. Carson*, 27 Minn. 516. In the absence of a statute allowing a lien on the land, or the owner's interest therein, it would, of course, be restricted to the building and materials; but, under a statute so restricting it, the lien will, where the building has been destroyed by fire, adhere to whatever brick, iron, or other debris may remain: *McLaughlin v. Green*, 48 Miss. 175.

BARTHELL v. PETER.

[88 WISCONSIN, 816.]

REAL ESTATE BROKERS—WHEN ENTITLED TO COMMISSION—FAILURE OF TITLE.—If an agent to sell land agrees to pay a commission to a broker for procuring a purchaser, and one is obtained, he is liable for the commission, though it is then discovered that the land does not belong to the principal. Such a mistake is not, in law, a mutual mistake which will avoid the contract to pay a commission on the sale.

Catlin & Butler and Carl C. Pope, for the appellant.

R. I. Tipton, and E. F. McCausland, for the respondent.

816 WINSLOW, J. This action is brought to recover the commissions of a real estate broker. The action was tried by the court. The facts were, and the court found, that the defendant, who was an agent to sell certain lands in Douglas county for a principal, agreed to pay the plaintiff a commission of five hundred dollars if he would find a purchaser ready, able, and willing to purchase a certain described parcel of real estate in Douglas county. The plaintiff found and produced such purchaser, and then defendant discovered that the said parcel of land was not the property of his

principal; and he claims that this was a mutual mistake of fact, which avoided the contract to pay commissions on the sale. The plaintiff was in no way responsible for the defendant's mistake. On these facts judgment was rendered for the plaintiff. This judgment was plainly right. The defendant's mistake was not, within the meaning of the law, a mutual mistake. The fact concerning which ^{§17} the mistake was made was not an inducement to the contract, or material thereto, so far as plaintiff was concerned. The plaintiff performed the labor which he agreed to perform, and cannot be defeated by the fact that defendant was negligently mistaken as to a fact which was entirely immaterial to the plaintiff, and which should have been within the defendant's own knowledge.

By the COURT. Judgment affirmed.

BROKER—WHEN ENTITLED TO COMMISSION.—A broker is entitled to his commissions for selling real estate when he procures a purchaser who is ready, willing, and able to buy: *Gelatt v. Ridge*, 117 Mo. 553; 38 Am. St. Rep. 683, and note. He cannot be deprived of his commission by a failure of title: See note to *Kalley v. Baker*, 28 Am. St. Rep. 547.

LISTMAN MILL COMPANY v. WILLIAM LISTMAN MILLING COMPANY.

[88 WISCONSIN, 334.]

VALID TRADEMARK, WHAT CONSTITUTES.—Only such names, words, and devices as indicate the origin or ownership of goods constitute valid trademarks. But a valid trademark may consist of some novel device, arbitrary character, or fancy word, applied without special meaning, which by use and reputation comes to serve the same purpose. Hence, the word "Marvel," used in a flour brand to designate the output of a certain mill, is a valid trademark, which equity will protect.

TRADEMARK, WHAT DOES NOT CONSTITUTE.—Such words as are merely descriptive of the kind, nature, character, or quality of the goods upon which they are used cannot be exclusively appropriated and protected as a trademark.

TITLE TO A TRADEMARK is acquired and retained by appropriation and use.

TRADEMARK MAY PASS BY CONVEYANCE WITHOUT EXPRESS TRANSFER.—If a trademark, through all changes of the ownership of a business, continuously designates its product, the exclusive right to the use of the trademark passes by a conveyance of the business, particularly where that includes goodwill, though nothing is said about the trademark.

AN INJUNCTION WILL ISSUE TO RESTRAIN THE PIRACY OF PLAINTIFF'S TRADEMARK, the distinguishing feature of which is used, in combination with

others, to constitute a trademark or brand so similar in appearance as probably to deceive customers or patrons of plaintiff's trade or business, although it is not shown that any one has in fact been deceived, or that there has been intentional fraud.

APPEAL from an order denying a motion to dissolve a temporary injunction. The question involved was the right or title of the defendant to use a trademark or label as a distinctive mark of the flour manufactured by it. The trademark, "Marvel," was originated by William Listman, who had used it individually, and who afterwards became a member of a partnership which commenced the manufacture of flour to which the trademark, "Marvel," was uniformly applied. The mark was registered in the name of Listman alone. Its use was continued by the firm and by a corporation which succeeded the firm in the operation of the mill, and also by the plaintiff corporation, which purchased the site and erected a new mill after the old one was burned down. Listman practically owned all of the stock of the former corporation when the business was transferred to the plaintiff. He was also largely interested in the latter and was its general manager for four years. Listman then sold his interest in the plaintiff corporation, and became the president and general manager of the defendant corporation, which thereafter used the trademark, "Marvel," upon the product of its mill, situated in another city. In these transfers there was nothing said about the trademark.

Catlin & Butler and A. C. Paul, for the appellant.

George H. Gordon and Winkler, Flanders, Smith, Bottum & Vilas, for the respondent.

340 NEWMAN, J. Only such names, words, and devices as may be held to be adapted to point out the true source and origin of the goods upon which such marks are used can constitute valid trademarks. Such words as are merely descriptive of the kind, nature, character, or quality of the goods cannot be exclusively appropriated and protected as a trademark. But a valid trademark may consist of some novel device, arbitrary character, or fancy word, applied without special meaning, which by use and reputation comes to serve the same purpose. Such words and devices are held to indicate sufficiently the true source and origin of the goods, without particular addition of the name of the manufacturer or dealer: *Dunbar v. Glenn*, 42 Wis. 118; 24 Am.

Rep. 395; *Marshall v. Pinkham*, 52 Wis. 572; 38 Am. Rep. 756; *Gessler v. Grieb*, 80 Wis. 21; 27 Am. St. Rep. 20, and cases cited; *Fish Brothers Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546; 33 Am. St. Rep. 72. The word "Marvel," used in the plaintiff's flour brand, is such an arbitrary or fancy word. It is not, in any true sense, descriptive of any characteristic or quality of the goods which it is used to designate, but rather indicates their origin or ownership. It is very much like the word "Bethesda," used to designate the water of a certain spring in Waukesha county, which was held to be a valid trademark in *Dunbar v. Glenn*, 42 Wis. 118; 24 Am. Rep. 395. It is used by the plaintiff in a similar way to designate the output of its mill. As was said in that case, the word seems to have been adopted to indicate origin or ownership, and to have a name by which the product of the mill could be distinguished when bought and sold in the market. As was said in *Filley v. Fassett*, 44 Mo. 168, 100 Am. Dec. 275, this word was the prominent, essential, and vital feature of the trademark. The goods were known by this word itself. It constitutes a valid trademark, such as equity will protect.

Title to a trademark is acquired and retained by appropriation and use. While William Listman owned and conducted ³⁴¹ the business this word was a part of his trademark—the distinguishing and essential feature; while the business was conducted by a copartnership it was the trademark of the copartnership; and, when the same business was done by a corporation, it was the trademark of the corporation. Through all these changes of ownership of the plant and business it continuously designated the output and product of the same mill. It did not cease to be the trademark, to designate its output of flour, when or because Listman sold his stock in the corporation, and ceased to have an interest in the business. It had been appropriated and used to designate and give a name to the product of the same mill and business by which it was known in the market through all these successive proprietaries, and during this time it had not been used to designate any article of which Listman himself was sole proprietor.

Listman seems to have owned virtually the entire plant and business at the time when he conveyed to the corporation. He says that it was not understood that the title to the trademark passed by that conveyance. This seems to

mean that nothing was said about it. There was no agreement that it should pass. Under such circumstances it was a question of law whether it did pass. Listman was one of the promoters of the corporation. He conveyed to it the mill-site, with the business and goodwill—at least, all the title he had in it. Ordinarily the goodwill of a business passes by a conveyance of the place where the business has been carried on, without special mention. The purchaser who acquires such goodwill takes with it the exclusive right to the use of such trademarks as have been up to that time in use in the business, without mention of them in the contract of sale: 17 Am. & Eng. Ency. of Law, 1187, and cases cited in the notes; *Fish Brothers Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, and cases cited on page 562; 33 Am. St. Rep. 72; *Shipwright v. Clements*, 19 Week. Rep. 599; *Brass & Iron W. Co. v. Payne*, 50 Ohio St. 115. Many of the cases are where one partner sells out to the other partners. It cannot be less clear when a mere stockholder in a corporation transfers his stock, for a mere stockholder has no title in the corporate property. So it seems right to hold that, whatever property Listman may have had in this trademark at some earlier date, none remained to him after he ceased to be a stockholder in the plaintiff corporation.

The defendant has used this word "Marvel" as a part of its flour brand or trademark against the plaintiff's protest and objection. It has used it in combination with other words, so as to constitute a brand or trademark so similar in appearance to the plaintiff's that the difference might easily pass without observation to casual observers. The plaintiff complains only of its use of the distinguishing word "Marvel." In order to support the action the imitation of the trademark need not be exact or perfect. It may be limited and partial. Nor is it requisite that the whole should be pirated. Nor is it necessary to show that any one has in fact been deceived. Nor is it necessary to prove intentional fraud. If the court sees that the plaintiff's trademarks are simulated in such a manner as probably to deceive customers or patrons of its trade or business the piracy should be checked at once by injunction: *Filley v. Fassett*, 44 Mo. 178; 100 Am. Dec. 275, and cases cited. It is a proper case for the issuance of an injunction.

By the COURT. The order of the circuit court is affirmed.

TRADEMARKS are for the purpose of pointing out the source, origin, or ownership of the goods to which they are applied, or the dealer's place of business; and they usually include the name of the manufacturer or dealer, though they sometimes consist of some novel device, arbitrary character, or fancy word, applied without special meaning, and which, by use and reputation, comes to serve the same purpose: *Gessler v. Grieb*, 80 Wis. 21; 27 Am. St. Rep. 20. An exclusive proprietary right cannot be acquired in a word which is a generic term, and in its nature descriptive of that to which it pertains, rather than its origin or proprietorship: See note to *Keasbey v. Brooklyn Chemical Works*, 40 Am. St. Rep. 630. The right to a trademark is derived from its appropriation and continued user: *Caswell v. Hazard*, 121 N. Y. 484; 18 Am. St. Rep. 833. A trademark affixed to articles manufactured at a particular place may be lawfully sold and transferred with the establishment: See note to *Fish Brothers Wagon Co. v. La Belle Wagon Works*, 33 Am. St. Rep. 82. But a voluntary assignment of a trademark may probably be effected without especially mentioning it, as where a business is sold, and the goodwill thereof assigned: See monographic note to *Symonds v. Jones*, 17 Am. St. Rep. 496, discussing the assignment of trademarks of which the assignor's name is a part. Thus, if a manufactory of wagons, in which the names of the founders of the business and a rebus to represent their surname have been used as trademarks, is sold and assigned to a corporation, the corporation acquires by the sale and assignment the goodwill of the original business, and the right to use such names and rebus as trademarks, although they were not specifically mentioned in any of the transfers of the business to the corporation. But, if there has been no agreement to give to the corporation the exclusive right to use such names and rebus and trademarks, a new firm composed of such original founders of the business transferred to the corporation may use the same names and rebus in advertising wagons made by them, provided they do not use them in a way calculated to induce persons to buy the same as and for those manufactured by the corporation. The new firm, however, has no right to represent that their business is the same as that originally conducted by them: *Fish Brothers Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546; 33 Am. St. Rep. 72. One who has infringed the trademark of another may be restrained by an injunction from making use of the imitation: Note to *Liggitt etc. Co. v. Reid etc. Co.*, 24 Am. St. Rep. 316. When a trademark is calculated to deceive, an intention to deceive will be presumed, and an injunction to prevent its use will be granted: Note to *Radam v. Capital Microbe Destroyer Co.*, 26 Am. St. Rep. 793.

BERGERON v MILES.

[88 WISCONSIN, 397.]

DECEIT—JOINT PURCHASE OF LAND.—If one party induces another to join with him in the purchase of land, each to pay one-half of the purchase price, which the former falsely represents to be greater than it really is, and the latter gives the former one-half of such excessive price to be used in paying for his share, and the former pays for the land with a smaller amount, keeping the remainder himself, the deceit is actionable and the latter may recover the amount paid in excess of his share of the actual price, though the land is worth the price represented.

ACTION to recover money obtained by deceit. Defendant, Miles induced the plaintiff, Bergeron, to join with him in the purchase of certain land, each to pay one-half of the purchase price. Miles falsely represented the purchase price to be eight thousand dollars, when, in fact, it was but three thousand. Bergeron gave Miles four thousand dollars to be used in paying for his share. Miles paid out three thousand dollars of this money for the land, this being its actual purchase price, and kept the remaining one thousand dollars himself. There was a judgment for the plaintiff for two thousand five hundred dollars, and the defendant appealed.

T. J. Connor and H. H. Hayden, for the appellant.

T. F. Frawley, for the respondent.

398 **NEWMAN, J.** On the question whether the relation of the parties was such that the deceit practiced upon the plaintiff by the defendant will support the action, the case very much resembles *Grant v. Hardy*, 33 Wis. 668. To make the deceit actionable it is not necessary that the relation of the parties to each other shall be that of partners or tenants in common. Other relations which require and inspire trust and confidence to be reposed by the party deceived in the other may be sufficient to bring the case within the rule, as stated in *Grant v. Hardy*, 33 Wis. 674. If the defendant was under no obligation to the plaintiff to tell him all he knew about the land he was, at least, under obligation not to deceive him by false statements with reference to it or the price at which it was to be bought by them. This he did, and so obtained from him much more than plaintiff's share of the price.

It is not denied that the defendant purposely deceived the plaintiff as to the purchase price of the land. Plaintiff supposed that the price to be paid was eight thousand dollars. It was, in truth, only three thousand dollars. As it was represented to plaintiff, his share of the price was four thousand dollars. In truth, his share of the **399** price was only one thousand five hundred dollars. He gave to the defendant, on his representation, two thousand five hundred dollars more than his share of the price and more than he would have given if the defendant had not deceived him. Yet it is argued that this deceit is not actionable, because, it is said, the plaintiff was not damaged by it. This contention

is based upon the assumed fact that the bargain was a good one at the price of eight thousand dollars. It must be evident that it would have been a better bargain at the price of three thousand dollars. The plaintiff was entitled to his share of the full profit of the bargain. He was entitled to all the profit there was in the bargain by paying only his share of the price. Whatever he has paid more than his share of the price, by so much is the value of his bargain diminished. This is damage. It is damage of which the deceit is the cause. The plaintiff paid two thousand five hundred dollars more than his share of the price. The judgment of the circuit court is right, and is affirmed.

By the COURT. Judgment affirmed.

DECEIT.—An action for false representations, called also an action for deceit, may be maintained against a party who makes a false representation of a fact, with knowledge of its falsity, to one who is ignorant of the falsity, with intent that it shall be acted upon, where the person to whom it is made acts upon it, and by so doing suffers injury: See monographic note to *Coltrill v. Krum*, 18 Am. St. Rep. 555, 557, showing a conflict of authority upon the question as to whether an action will lie against a vendor of real estate for false representations made by him as to the price which he paid for the property.

LUEBKE v. BERLIN MACHINE WORKS.

[88 WISCONSIN, 442.]

MASTER AND SERVANT—ASSUMPTION OF RISK BY MINOR SERVANT.—In working in a dangerous place an adult servant must take ordinary care to observe and ascertain what dangers and defects are incident to his service, and if, by the use of such care, he ought to observe and comprehend such dangers or defects, he assumes all risk by continuing in the employment; but whether a minor servant is of sufficient age, intelligence, discretion, and judgment to bring him within the operation of this rule is a question of fact for the jury.

MASTER AND SERVANT—MINOR SERVANT'S KNOWLEDGE OF DANGER, HOW DETERMINED.—A minor servant, in working in a dangerous place, must, as much as an adult, exercise the degree of intelligence, knowledge, and judgment actually possessed by him. The question, however, in such a case, is not what the minor, in fact, knows or comprehends as to the danger to which he is exposing himself, but what he, in view of his age, intelligence, discretion, and judgment, ought to know and understand.

ACTION by the plaintiff as administrator of his deceased minor son, John Luebke, to recover damages sustained by

the plaintiff by reason of the death of such son, caused, as alleged, by the negligence of the defendant when he was in its employment. There was a verdict and judgment for the plaintiff, and defendant appealed. It appeared that the defendant owned and operated a foundry and machine-shop situated on and partly over a mill-race, along Rock river, at Beloit. A narrow plank foot-bridge, without a railing, extended from a platform of the building across the race to the east side of it. This bridge was used by those who had charge of the power to go to and from the shop and foundry to the power-house on the east side of the race. The core-room of the foundry in which the plaintiffs' intestate, with other boys employed by the defendant, worked under a foreman making cores for castings, was a short distance south or below the bridge, and they required and used considerable flour in making them, which they obtained at a flour-mill on the opposite or east side of the race, a short distance above the east end of the bridge. There was a wagon bridge just below and south of the core-room, which was wide and safe, available to and sometimes used by the boys for getting flour from the mill. The evidence tended to show that they were never directed to go any particular way to get flour, or to use the foot-bridge, but went either way as they chose, that the defendant knew of and permitted the use of the foot-bridge by the boys for that purpose, and that the wheelbarrow they used was an old rickety one, and not a safe appliance for the purpose of bringing flour. Up to September 15, 1892, plaintiff's intestate, then a boy about sixteen years of age, had been in defendant's employ for several months. He was then, and had for some time been, at work in the core-room, it being his duty to make cores, attend to the fires, and to go after flour, etc. On the day in question he went over to the mill with the wheelbarrow to get flour. It did not appear that he had been specially directed to do so. He was advised by the miller to go back by way of the wagon bridge. He was not afterwards seen alive, and was taken out dead on the east side of the mill-race, the evidence tending to show that he must have fallen in about the middle of the foot-bridge. He left surviving him his father, the plaintiff, and his mother, each aged about fifty-five years and dependent in part on his services. Defendant asked the court to instruct the jury that "in determining whether the boy was of sufficient age, understanding, and experience to comprehend the dangers

to which the use of the bridge for carrying flour as he carried it on his last trip exposed him, you are to consider his age and opportunities which he had to observe the apparent danger of wheeling a barrel of flour across the mill-race upon the foot-bridge, and to determine, from all the facts and circumstances surrounding his death, whether or not he was of such an age and understanding that, even though he may not have fully apprehended it, yet that the danger was so open and apparent, if you find it to be so, that a boy of his age, experience, and understanding ought to have known it and ought not to have exposed himself to it." This request was refused.

Winkler, Flanders, Smith, Bottum & Vilas, for the appellant.

Winans & Hyzer, for the respondent.

447 PINNEY, J. The evidence tends very strongly to show that the dangers to which the plaintiff's intestate was exposed in his service and in crossing the foot-bridge with the wheelbarrow loaded with flour, whether arising from the defective and dangerous construction of the bridge or the 448 use of the wornout and rickety wheelbarrow, were open and obvious, and that he must have been familiar with the situation for a period of about three months, during which he was engaged in the core-room, and immediately prior to the accident. Had he been an adult it is difficult to see upon what ground it could be said that he had not, as a matter of law, by continuing so long in the service of the defendant, assumed the risk of injury from those causes, so that the case ought not to have been submitted to the jury. It is well settled that if the alleged defect or element of danger is such that, in the exercise of ordinary care, the servant ought to have observed it and comprehended the danger likely to result, then he assumed the risk if he continued in the employment: *Haley v. Jump River L. Co.*, 81 Wis. 412, 421, 425; *Dorsey v. Phillips etc. Const. Co.*, 42 Wis. 583; *Ballou v. Chicago etc. Ry. Co.*, 54 Wis. 257; 41 Am. Rep. 31; *Goltz v. Milwaukee etc. Ry. Co.*, 76 Wis. 136. The servant must take ordinary care to observe and ascertain whether any or what dangers are incident to his service. If the defect or danger is open and obvious, knowledge of it on his part will be presumed or imputed to him as a matter of law; and an adult servant is presumed to possess ordinary intelligence, judgment, and discretion to ap-

appreciate such danger, so as to regulate his conduct and avoid it. Knowledge of the danger, and consent to continue in the service notwithstanding, is in such case imputed to the servant; so that if he subsequently suffers injury in consequence thereof he has no right of recovery against the master. This view is in accordance with what was held in *Jones v. Florence M. Co.*, 66 Wis. 268, 277; 57 Am. Rep. 269. The same rule applies to the case of an employee who is a minor, where the defect or danger is open and obvious, in so far as he is of such age, intelligence, discretion, and judgment as to enable him to comprehend the situation and appreciate the danger incident to the work or employment. ⁴⁴⁹ Subject to this qualification, knowledge of the defect or danger is to be imputed to him in like manner as to an adult. It is, however, a question for the jury to determine upon the evidence whether a minor servant was of sufficient age, intelligence, discretion, and judgment to bring him within the operation of the rule applicable to adult servants: *Chopin v. Badger Paper Co.*, 83 Wis. 192. In the absence of proof it is fair to presume that he possessed these characteristics in the degree usual to persons of his age. Because the question was one for the jury, the defendant's motion for a nonsuit and the request that the jury be directed to find for the defendant were properly denied.

The instruction asked by the defendant, and refused, should, we think, have been given. The consequence of its refusal was that the defendant was denied the benefit of the rule as to imputed negligence and assumed risk, to the extent it was properly applicable to the case, and the case was made to turn, so far as open and obvious defects and danger were properly an element in the case, not upon what the plaintiff's intestate ought to have known and understood, in view of his age, intelligence, discretion, and judgment, but upon what he in fact knew or comprehended as to the danger to which he was exposing himself. He was bound to exercise the degree of intelligence, knowledge and judgment he actually possessed, as much so as an adult, and must be held to have assumed the risk if he exposed himself to a danger which was open and obvious, and which he was capable of perceiving and fully appreciating, whether he actually appreciated and comprehended it or not. The general charge does not contain any instruction equivalent to the one asked, and entirely excluded from the consideration of the jury the

material question whether the plaintiff, in view of his age, intelligence, discretion, and judgment, ought reasonably to have known ⁴⁵⁰ and understood the dangers to which he was exposed in his employment. The effect of this error is indicated by the answers of the jury to questions submitted to them, as above stated.

Other errors were assigned, but as the questions thus presented may not arise on a new trial, it is not necessary to consider them. For the reasons stated the judgment of the circuit court must be reversed.

By the COURT. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

MASTER AND SERVANT—MINOR EMPLOYEE.—A minor employee who knows and appreciates the danger and peril of the work in which he is engaged assumes the risk of his employment. If he is ignorant, however, of such danger and peril by reason of youth and inexperience, and has not been properly instructed by his employer, the latter is answerable for an injury sustained by reason of a want of such knowledge. Most especially should this duty of instruction be performed, when the dangers and the means of avoiding them are not apparent or fully within the comprehension of the servant. Whether a servant was such a person as was entitled to have special instructions concerning risks to which he was exposed, and the means of avoiding them, and whether the duty of instructing him was discharged by his employer, are matters for the jury to determine from all the facts and circumstances of the case. The burden is on the servant to prove the existence and breach of such duty, and, in determining whether a minor employee was, when injured by dangerous machinery, exercising ordinary care, the jury may take into consideration his age, intelligence, and discretion, and his knowledge of, or inexperience with, machinery. The same degree of care is not required of a mere boy of inexperience and immature judgment as of a person of mature years: *Chicago etc. Brick Co. v. Reiniger*, 140 Ill. 334; 33 Am. St. Rep. 249. Proof that a minor servant had done the work, in the doing of which he was injured, for some time prior to the accident, and of the number of times he had done it, may be properly considered by the jury in determining whether the master was negligent in requiring him to continue it. Ordinary care for minors is that degree of care which children of the same age are accustomed to exercise under similar circumstances. A minor servant, properly instructed concerning the danger of his employment, thereafter, stands on the same plane with other servants with respect to the risks of the employment: Note to *Greenway v. Conroy*, 40 Am. St. Rep. 718.

WOOD v. ARMOUR.

[88 WISCONSIN, 488.]

TAX TITLE MAY BE ACQUIRED BY MARRIED WOMAN.—A tax title to land may be acquired by a married woman acting in good faith, by a purchase out of her separate estate, although her husband is in possession of such land, and under a legal obligation to pay the taxes.

ADVERSE POSSESSION UNDER TAX TITLE ACQUIRED BY MARRIED WOMAN.

After a married woman has acquired a tax title to land in the possession of her husband, and put it on record, her possession of the land through tenants is none the less adverse to the original owner by reason of the fact that her husband acts as her agent in the management of the property.

HUSBAND MAY ACT AS AGENT FOR HIS WIFE.—It is entirely competent for a husband to act as his wife's agent in the transaction of his wife's separate business, and his doing so will not be allowed to prejudice the wife's rights.

EJECTMENT by the widow and heirs at law of one John P. Wood. The subject of controversy was part of a quarter section of land to which one Curtis Mann had held the title in fee prior to 1850. Mann, in February, 1850, deeded to Wood, who was then living in New York, and who died in 1864, still holding the paper title to the land. In 1856 Mann moved to Wisconsin with his family, and went into possession of the land, and remained in possession until August, 1887. He paid all taxes until November, 1877, when he became insolvent and paid no further taxes. The land was sold for the unpaid taxes of 1883 and 1884, and tax deeds, fair on their face, were made to Warham Parks, the holder of the tax certificate in 1887. This tax title was bought of the tax title holder, in August, 1887, by Nancy M. Mann, the wife of Curtis Mann, with money arising from her separate property, and she received a deed therefor. The land was then in the possession of tenants, and she, after getting her deed, received the rents, made repairs, paid expenses, redeemed unpaid taxes, and paid the current taxes. Her husband acted as her agent in these matters. In September, 1892, the land in controversy was conveyed by Nancy Mann to one Morse, who afterwards conveyed the same to the defendant. The circuit court found that the land had been adversely possessed by Curtis Mann for more than twenty years, that the tax title acquired by Nancy Mann was valid, and had been followed by adverse possession for more than three years. There was a judgment for defendant, and plaintiffs appealed.

Quarles, Spence & Quarles, for the appellants.

Warham Parks and Ryan & Merton, for the respondent.

490 WINSLOW, J. The record is quite voluminous. The foregoing statement does not state all of the facts which appear in evidence, but it is believed that it states all the facts which are material to the decision of the case. The question was much discussed, both in the briefs and in the argument, whether Curtis Mann's entry and subsequent possession were adverse. In the view we have taken of the case we find it unnecessary to decide this question. When the tax deed was executed the title to the property was either in the plaintiffs or in Curtis Mann, and in either event it was entirely competent for Nancy Mann, out of her separate estate, to purchase that tax title. The tax deeds were fair on their face. No irregularity is shown or claimed in the levy of the tax upon which they were based. Hence, they conveyed a title in fee simple, unless there was some legal reason why Nancy Mann could not purchase that title.

It is suggested that Curtis Mann could not acquire the tax title, because he was in possession of the land and it ⁴⁹¹ was assessed to him, so that he was under legal obligation to pay the taxes. However much force this argument might have against a title acquired by Curtis Mann, or by a third person collusively for Mann's benefit, it has no force against Mrs Mann, who was not in possession and was under no obligation to protect the title. No duty rested on her to pay the taxes on these lands, whether they belonged to her husband or to the plaintiffs. She had a separate estate, and, if she chose to use a part of it in purchasing a tax title on these lands in good faith and for her own benefit, we know of no rule, in the present state of the law as to the property rights of married women, which would prevent her from doing so. The evidence showed, and the court rightly found, that, after such purchase, she went into possession of the lands in question, and held such possession until she conveyed the same to the defendant's grantor. The actual manual possession during this time was in tenants, but we think the possession of these tenants, under the facts, must be held to be the possession of Mrs. Mann. She received the rents and profits, built fences, repaired buildings, paid the taxes, and managed the property as her own. It is true that her husband acted as her agent in many of these matters, but it is entirely com-

petent for the husband to so act in the transaction of his wife's separate business, and we do not see how this is to prejudice the wife's rights. Certainly no one has had possession adverse to her since she acquired title. The plaintiffs have not, and her husband has not, nor have the tenants. She put her title on record at once, thus announcing to all the world, including the plaintiffs, that she claimed title to the premises. This constituted not only a "challenge of the right of the original owner and all opposing claimants, but it was notice to them of its existence and presumed validity": *Knox v. Cleveland*, 13 Wis. 245.

⁴⁹² In any view which we have been able to take of the case we have been unable to see why the tax title acquired by Nancy Mann did not vest in her a perfect title to the property, which is now vested in the defendant, her grantee.

By the COURT. Judgment affirmed.

WHO MAY PURCHASE AT TAX SALE.—One who is under no legal or moral obligation to pay taxes on a piece of land is not precluded from purchasing at a tax sale thereof, although in possession at the time of assessment or sale: See note to *Laton v. Balcom*, 10 Am. St. Rep. 383, and monographic note to *Blake v. Howe*, 15 Am. Dec. 684-690, on who may purchase at a tax sale.

A HUSBAND MAY ACT AS AGENT FOR HIS WIFE in transactions relating to her separate estate: Notes to *Hoffman v. McFadden*, 35 Am. St. Rep. 105; *Wells v. Batts*, 34 Am. St. Rep. 512. The fact that he assists her in the management of her separate estate does not impair her title to its products, and the value of the husband's labor and skill in such a case cannot be reached by creditors: Note to *Trapnell v. Conklyn*, 38 Am. St. Rep. 47. Whether he has been constituted her agent is a question of fact for the jury: Note to *Wells v. Batts*, 34 Am. St. Rep. 512.

STATE v. INTERNATIONAL INVESTMENT Co.

[88 WISCONSIN, 512.]

CORPORATIONS—WHAT HAVE NO VALIDITY.—A corporation whose primary object is without statutory authority can have no lawful existence, although some of its declared purposes may be lawful. Hence, if its primary object is to obtain money from its members, it is unauthorized, although its declared purposes are "to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly installments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accommodations; and to carry on and conduct a general investment business."

CORPORATIONS—PURPOSES NOT EXTENDED BY GENERAL WORDS OF STATUTE.—Under a statute authorizing the formation of corporations for certain designated purposes the general words “or for any lawful business or purpose whatever, except,” etc., extend only to things of a nature kindred to those specifically mentioned.

ACTION to annul the charter of a corporation, brought under section 3241 of the Revised Statutes. The company appears to have been incorporated July 7, 1893, but its original articles of organization and incorporation were amended on December 8, 1893, so as to provide for the salaries of the officers, directors, and agents of the company. The company was to do business as stated in the opinion, and had no capital stock. It was composed of incorporators and members. It was provided that the corporation should issue incorporators' shares, originally, only to the persons who signed the original articles, and to such other persons as the said incorporators or their assignees should nominate, but not more than twelve incorporators' shares were to be issued, one to each. Contracts of membership were provided for, but one person could hold and own any number of such contracts, and the same were assignable. Fines and forfeitures for the nonpayment of monthly dues were provided for. No person except those holding incorporators' shares could be a member unless he held a contract of membership, but every person holding such a contract could be a member, and not less than four contracts of membership could be issued upon any single application. All the rights and benefits of the company were granted to members in consideration of a membership fee of five dollars, and to keep certain promises and agreements, but not longer. The monthly dues were two dollars. The company was to pay out of a reserve fund a benefit of one thousand dollars, forty-three years after date of the contract, under certain provisos and conditions, or to pay out of a members' trust fund that sum, subject to discount and certain other provisos and conditions. The contracts issued were to be numbered in numerical order, and to be issued only in blocks of four. The company was not required to give any notice of the maturity of installments or the assessment of fines, or of forfeiture or lapse of contract. To the “members' trust fund” provided for by the rules there was to be applied one dollar from each monthly installment received, and all fines and transfer fees collected, and from which should be made the payment upon contracts mentioned in article 12.

Article 12 provided that, as often as there should be in the members' trust fund the sum of one thousand dollars, there should be paid to the holder of one outstanding contract of membership the sum of one thousand dollars, subject to certain conditions; that the first contract upon which payment should be made should be contract No. 1, the second payment should be upon contract No. 4, the third payment upon contract No. 2, the fourth payment upon contract No. 8, and so on, reverting back to the first issued, unforfeited, unpaid nonmultiple contract, and alternating with the lowest unpaid, unforfeited multiple of four, until like payments had been made to the holders of all issued, unpaid contracts; but the company was not required to make payment upon any contract until there was sufficient money in the members' trust fund therefor, nor until such contract was regularly reached in its order for payment. Article 14 provided that in case there should have been less than sixty monthly installments paid upon any contract of membership up to the time that it was canceled by payment, then there should be deducted and reserved twenty per centum of the amount due upon every such contract. Article 15 provided for a "reserve fund," and that whenever any contract should mature, under the provisions for payment, forty-three years from and after the date thereof, provided it had not been paid before that time, there should be paid to the holder thereof the sum of one thousand dollars from said reserve fund. The attorney general, on application, refused to bring an action to vacate the charter and to annul said corporation, and the relator was allowed to file his petition in the supreme court, alleging in effect that the business of the alleged corporation was illegal, for the reasons that it had in it the element of chance and uncertainty, and was in violation of the statutes against lotteries; that its manner of doing business was intended to deceive persons becoming members thereof; and that its business was illegal and contrary to law, and a common and public fraud. The defendant answered by way of admissions and denials, and alleged that it had about five hundred members and contract holders, and a large number of agents soliciting persons to become members; that it had not yet paid a contract of membership, for the reason that it had not continued business long enough, nor extensive enough, for the purpose. The answer was demurred to on the ground that it did not state facts sufficient to constitute a defense.

Hugh Ryan, for the plaintiff.

David S. Rose, for the defendant.

⁵¹⁷ CASSODAY, J. There is really no dispute in the facts. The jugglery with figures provided for in the articles of incorporation, and mentioned in the foregoing statement, may be such as to make the rights of contract holders a matter of so much uncertainty and chance as to bring the defendant under the condemnation of the statutes against lotteries and gambling, as contended by counsel for the ⁵¹⁸ relator: *Commonwealth v. Wright*, 137 Mass. 250; 50 Am. Rep. 306; *Wilkinson v. Gill*, 74 N. Y. 63; 30 Am. Rep. 264. But the view we have taken of the case makes it unnecessary to determine that question.

Of course there can be no valid incorporation without legislative authority. As will be observed in the foregoing statement, the charter declares, in effect, that the business of the corporation "shall be to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly installments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accumulations; and to carry on and conduct a general investment business." But we find nothing in the articles of incorporation "to encourage frugality and economy in its members." Besides, we find no statute authorizing an incorporation for any such purpose. The same is true in regard to creating, husbanding, and distributing funds from monthly installments, dues, or investments from its members, as mentioned. The only statutory authority relied upon is section 1771 of the Revised Statutes, as amended. This statute does authorize the formation of a corporation "for buying, selling, exchanging, and dealing in all kinds of property, real or personal, or both"; but it is manifest, from the articles of incorporation before us, that the buying, holding, leasing, and selling property is not the primary object of this corporation. On the contrary, its primary and most important object is to obtain moneys from its members, and its incidental or secondary object is the disposal of the moneys after they are so obtained. If, therefore, the general scheme for obtaining the moneys is without statutory authority, then the corporation has no legal existence. So, the statute authorizes the formation of a corporation "for loaning money on secu-

rities or otherwise." But "to loan surplus accumulations, and to carry on and conduct a general investment business," is ⁵¹⁹ not the primary object of this corporation. On the contrary, and as already observed, its primary object is to first obtain the moneys from its members, and its incidental or secondary object is to dispose of moneys so obtained. If, therefore, such primary object is without statutory authority, then the whole scheme must fail. Counsel for the defendant was asked on the argument to state the real business of this corporation, and he answered that it was a "species of philanthropy." But there is nothing in the articles of incorporation to justify the conclusion that its purpose is to do good or bestow benefits upon its members—much less upon mankind in general. If it is designed to confer favors upon any persons it must be its officers and managers. Besides, the section of the statute cited does not authorize the formation of a corporation for such philanthropy. The nearest approach to it is the authority to form a corporation "for the establishment and maintenance of any benevolent, charitable, or medical institution, hospital, or asylum." Of course there was no authority to form this corporation under that clause.

Counsel does not claim that this corporation belongs to any of the classes of corporations specifically authorized by the section, but he contends that the formation of such a corporation is authorized by the general clause following the several specific classes mentioned, to wit, "or for any lawful business or purpose whatever, except" as therein stated. But, by a well-settled rule of construction, these general words extend only to things of a kindred nature to those specifically authorized by the section. *Noscitur a sociis*: *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 38. That rule has been repeatedly applied by this court to numerous statutes, where general words have followed specific authority: *Bevitt v. Crandall*, 19 Wis. 581, 583; *Edson v. Hayden*, 20 Wis. 684; *Morse v. Buffalo F. & M. Ins. Co.*, 30 Wis. 534; 11 Am. Rep. 587; *Attorney General v. Railroad Cos.*, 35 Wis. ⁵²⁰ 519; *Campbell v. Campbell*, 37 Wis. 218; *Sawyer v. Dodge County Mut. Ins. Co.*, 37 Wis. 503; *Cleaver v. Cleaver*, 39 Wis. 102; 20 Am. Rep. 30; *Gibson v. Gibson*, 43 Wis. 33; 28 Am. Rep. 527; *Kelley v. Madison*, 43 Wis. 645; 28 Am. Rep. 576; *Wisconsin Cent. R. Co. v. Smith*, 52 Wis. 144; *Blake v. Blake*, 75 Wis. 343. Any other construction would enable parties,

by mere agreement, to form a corporation for any conceivable "business or purpose whatever," not in violation of law. Certainly the legislature never intended to grant such unlimited authority.

It does not appear that the relator is an elector, citizen, or taxpayer of the state, nor that he is a member of, or in any way interested in, this corporation. It is merely alleged that he is a "resident" of the city and county of Milwaukee. It may be a serious question whether a mere private person who happens to reside in the state can, as relator, maintain such an action: *State v. Tuttle*, 53 Wis. 45. But no such objection has been made. The question of the authority to form such corporation is so important that we deem it our duty to decide it.

By the COURT. The demurrer to the answer is sustained, and judgment is hereby directed, vacating, dissolving, and annulling the corporate existence of the defendant, and ousting it of its franchises.

IF THE PURPOSE OF A CORPORATION as disclosed in the articles is one not sanctioned by law no corporation is created thereby: See monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 178, on defective formation of corporations.

GIFFORD v. HARDELL.

[88 WISCONSIN, 588.]

CHECKS—DILIGENCE AS TO PRESENTMENT.—The rule of diligence as between indorsee and indorser is the same as between payee and drawer. Hence the indorser of a check is not liable thereon if it is not presented for payment within a reasonable time after its indorsement and delivery.

CHECKS—COMMENCEMENT OF REASONABLE TIME FOR PRESENTATION.—As between the indorsee and indorser of a check the period of reasonable time for presentation begins when the check is delivered to the indorsee or to his agent.

CHECKS—DILIGENCE AS TO PRESENTMENT IN DISTANT PLACE.—The general rule of diligence as to the presentation of a check received in a place distant from that of the bank upon which it is drawn is, that the check must be forwarded to the latter place on the next secular day after its receipt, and be presented for payment on the day after it has reached such place by due course of mail.

CHECKS—PERIODS FOR PRESENTATION.—Each indorsee of a check is allowed the same period of time for presentation for payment, as between himself and his immediate indorser, that the payee had as between himself and the drawer.

ACTION to recover the amount of four checks protested for nonpayment. The action was against the defendant as indorser. The checks had been drawn on a Milwaukee bank, indorsed to the defendant, and by him indorsed to the plaintiff. They were delivered to the plaintiff's agent at Dousman on July 17th, who at once mailed them to the plaintiff at New Richmond. They were received on July 18th, and at once delivered to a local bank for collection. That bank had no correspondent in Milwaukee, and immediately mailed the checks to its correspondent in Chicago. From the last-named city they were forwarded to Milwaukee, but were not presented for payment until July 21st. The bank upon which the checks were drawn had failed and closed its doors at the usual hour on July 20th. If the checks had been sent directly to Milwaukee from New Richmond they would have arrived in time for presentation on July 20th, and would have been paid, if then presented, while the bank was honoring its checks. The trial court held that sending the checks by way of Chicago for collection was not the use of reasonable diligence in presenting them for payment, and directed a verdict for the defendant, and from the judgment rendered thereon the plaintiff appealed.

Ryan & Merton, for the appellant.

Warham Parks, for the respondent.

§40 PINNEY, J. The same rules which exist in relation to the necessity of presentment and notice, in order to charge the indorser of bills of exchange in general, apply as well to an indorser of a check. A check on a bank is presumed to be drawn against deposited funds, and, unlike a bill of exchange, which need not be drawn on a deposit, is generally designed for immediate payment, and not for circulation. For this reason it is of greater importance than in the case of a bill that a check shall be promptly presented, and the drawer notified of nonpayment, so that he may speedily inquire into the cause of refusal, and take prompt measures to secure his funds deposited in the bank. The indorsers of bills and of checks stand on the same footing in reference to the effect of delay or failure in making presentment or giving notice of nonpayment, and are absolutely and entirely **§41** discharged if presentment be not made within a

reasonable time, and this rule applies as between an indorser and indorsee, as in the present case.

It is plain from the facts that, if the bank at New Richmond had forwarded the checks direct to Milwaukee for collection, they would have been received, at the furthest, in time for presentation and payment on the 20th of July, and while the bank on which they were drawn was transacting its usual business; and it appears that it had ample funds of the drawer with which to have paid them. The period of reasonable time for presentation, as between the plaintiff and the defendant as indorser, undoubtedly began when the checks were delivered to the plaintiff's father for him, at Dousman, Waukesha county, Wisconsin, on the 17th of July: Daniell on Negotiable Instruments, secs. 1586, 1587, and cases in notes. The drawer of a check cannot rightfully withdraw his funds necessary for the payment of it upon proper presentation, and it would be unjust to hold that, however long the holder might permit the fund to remain, it should be at the drawer's risk. Hence, the check must be presented within a reasonable time or the indorser will be discharged, and the fund is at the risk of the holder if he permits the deposit to remain. No transfer, or series of transfers, can prolong the risk of the drawer or indorser beyond this period, though each party is allowed the same period, as between himself and his immediate predecessor, that the payee had as between himself and the drawer; for no transferee can stand on any better footing than his transferor in respect to the time within which the check must be presented in order to render the drawer's or previous indorser's liability absolute in the event of the failure of the bank. Daniell on Negotiable Instruments, sec. 1595, and cases in note.

The rule of diligence as between indorsee and indorser is the same as between payee and drawer: This requires, in general, that, where the payee receives the check from the drawer in a place distant from the place where the ⁵⁴² bank on which it is drawn is located, it will be sufficient for him to forward it by post to some person at the latter place on the next secular day after it is received, and then it will be sufficient for the person to whom it is thus forwarded to present it for payment on the day after it has reached him by due course of mail. When the defendant delivered the checks, properly indorsed, at Dousman, Wisconsin, on the 17th of July, he had a right to assume and expect

that the plaintiff or his father would present them for payment within a reasonable time, and they took the risk of making such presentment. Instead, they were sent several hundred miles to the northwest of Milwaukee, to New Richmond, and then back through Milwaukee to Chicago, and were then returned to Milwaukee for payment on the 21st, as before stated. It is clear that they were not presented for payment within a reasonable time after indorsement and delivery by the defendant, and the judgment of the county court was therefore correct: *First Nat. Bank v. Miller*, 37 Neb. 500; 40 Am. St. Rep. 499, and cases cited.

By the COURT. The judgment of the county court is affirmed.

CHECKS—DILIGENCE REQUIRED IN PRESENTMENT OF.—To charge an indorser of a check it must be presented by the indorsee within a reasonable time. Such time depends upon the facts and circumstances of each particular case: *First National Bank v. Miller*, 37 Neb. 500; 40 Am. St. Rep. 499, and note; monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 808. If the holder of the check and the banker on whom it is drawn reside in different places the check must, in the absence of special circumstances, be forwarded by mail for presentment on the day, or on the next secular day after, it is received, and the agent or person to whom it is forwarded must, in like manner, present or forward it on the day or day after he receives it, in due course of mail, otherwise the drawer or indorser will be released: See monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 809, discussing checks and the duty of the holder thereof in order to make the drawer or indorser liable thereon.

ANSORGE v. BARTH.

[88 WISCONSIN, 553.]

INSOLVENT DEBTOR — DISPOSITION OF EXEMPT PROPERTY. — As against creditors, an insolvent debtor has a right to give his exempt property to his son as well as his time in carrying on and managing his son's business.

FRAUD AGAINST CREDITORS—CONCEALMENT OF PROPERTY UNDER COVER OF AGENCY.—An insolvent debtor cannot accumulate property under cover of another's name, acting ostensibly as the latter's agent. If such a claim is made, it is always a question of fact whether the business actually belongs to such other person or to the ostensible agent and debtor, and whether the alleged agency is a mere scheme and device to conceal and keep the property used in, or gained by, it from his creditors.

FRAUDULENT CONVEYANCE—EVIDENCE—CONCEALMENT OF BUSINESS CARRIED ON IN SON'S NAME.—In an action to subject land purchased in the name of the wife of an insolvent debtor, and paid for out of the

proceeds of a business carried on by him in the name of his son, evidence that the wife had no separate estate, that the son had made no other contribution to the business than the use of his name, that he had paid no attention to the purchase of the real estate, which was made by his father, and not showing that the son had ever received any of the proceeds of the business, or that they have ever had an accounting with reference thereto, sustains findings that the debtor was the real owner of the business, and carried it on in the son's name for the purpose of fraudulently concealing it and its profits from his creditors, that the real estate was purchased with such profits, and conveyed to the wife, and accepted by her with like fraudulent intent, and that it should be conveyed by her to her husband's assignee for the benefit of creditors.

ACTION by the plaintiff, as assignee of the defendant Barth, for the benefit of his creditors, under an assignment made July 31, 1889, against the assignor and Anna Barth, his wife, to reach and subject to the payment of the debts of the assignor three certain parcels of real estate purchased, and conveyed to the defendant, Anna Barth, the value of the same aggregating about five thousand six hundred dollars. It was charged that the land was purchased with the money and funds of her husband, derived from a business carried on nominally in the name of his son, Alois Barth, but really and in fact by the father, and for the latter's sole benefit; and that the father caused the parties from whom he purchased the land to convey the title to his wife, for the purpose and with the intent of defrauding his creditors. There was a judgment for plaintiff, decreeing that Anna Barth should convey and assign the property to the plaintiff, to be disposed of by him in payment of the husband's debts, etc., and defendants appealed.

Wigman & Martin and Joshua Stark, for the appellants.

Ellis, Greene & Merrill, for the respondent.

556 **PINNEY, J.** It appears that the assignor, Barth, in 1874, was engaged with others in the wholesale liquor business, and they failed. All the assignor's property not exempt from execution was taken on execution and sold. With his exemptions, amounting to two hundred dollars, he started a saloon, and continued in that business until May, 1881, but without much success, for it is conceded that he was still insolvent, and owned no property not exempt. He had a family of eight children, six of whom lived with him. His oldest son, Alois, was, and for some years had been, engaged in car-

rying on successfully the business of manufacturing and selling cigars upon premises adjoining the building in which the assignor, Barth, had his saloon. The appellants claimed that in May, 1881, the assignor, Barth, sold and transferred his saloon business and the exempt property he owned connected therewith to his son, Alois, and that thereafter the business was carried on by and in the name of the son, by whom the license fees and special taxes on the business were paid; that the assignor, A. Joseph Barth, was employed as manager of the business, at a salary of sixty dollars a month during the first two years, and thereafter of seventy dollars; two other sons were also employed upon various salaries in the said business; that, shortly after purchasing the saloon, Alois borrowed four hundred dollars, and started in a small way a wholesale liquor business upon the same premises. It appeared ⁵⁵⁷ that the special taxes to the United States for the liquor business had been charged to Alois, the son, each year, from May 7, 1884, to July, 1892, and receipts given therefor were in his name, and that licenses were issued for the same business by the city of Green Bay to him from May, 1887, to May, 1892; that Alois Barth did not actively participate in the management of the saloon or the liquor business, but they were entirely conducted by his father. It seems to be a fair conclusion, from the evidence, that the proceeds of the cigar business were not used in any way for the saloon or liquor business, but that each business was managed and conducted entirely separate from the other; and the question presented was whether the title and ownership of the son to the saloon and liquor business and its proceeds were real and *bona fide*, or whether they were merely simulated, and a sham and cover to protect and keep the property from his father's creditors, and enable him to enjoy and dispose of it at his pleasure.

There was some evidence tending to show that on a few occasions the father had spoken and acted in reference to the business as his own, but it was all transacted in the name of the son. It was shown beyond dispute that the property in question was purchased and paid for, and some of it considerably improved, from the proceeds of the liquor business. The assignor, Barth, was, during all these years, insolvent, and there was a judgment over him, upon which there was due over ten thousand dollars, besides interest; and this fact shows a strong motive why a man not more

than fifty-four years old consented to become a subordinate and servant where he had hitherto been owner and master. After the lapse of a considerable number of years he made the assignment, upon the basis of which he now seeks to obtain a discharge from his debts; and this is significant, and shows his anxiety to be again in a position to transact business in his own name; but, if the theory advanced by the ⁵⁵⁸ appellants is true, he has no means whatever with which to engage in any business pursuit. A careful examination of the evidence shows, so far as we can discover, that all that Alois, the son, ever contributed to the business was the mere use of his name; for it is doubtful if he ever paid his father any thing for the exempt property, and the borrowed money raised to extend the business was, no doubt, paid out of its profits. There is certainly no evidence that Alois paid any thing out of the proceeds of his cigar business to or for the benefit of the saloon or liquor business, and there was no substantial or satisfactory change of possession at the time of the alleged transfer. The facts upon which the defendant Anna Barth founds her title are certainly very equivocal, not to say suspicious. Besides, the relations existing between the parties are such that, while they are not *per se* a badge of fraud, yet they facilitate and render its perpetration comparatively easy, and are proper matter for consideration in connection with all the facts and circumstances: *Hoxie v. Price*, 31 Wis. 82, 86; *Beard v. Dedolph*, 29 Wis. 136. The assignor and his wife, as well as Alois, all testified that the business belonged to and was the business of the latter, and that his father had no interest in it; but their statements to this effect are, to a great extent, matter of opinion and conclusion, and, in view of the circumstances, are not very satisfactory evidence. Neither the books kept in the liquor store or cigar business, nor any documentary evidence whatever, beyond the deeds to the real estate and the licenses and tax receipts, were presented to sustain the title of the defendant Anna Barth as against the claim of her husband's creditors and the circumstantial and cogent evidence of fraud thus presented.

The issue was a narrow one; namely, whether A. Joseph Barth was merely a *bona fide* employee, without interest or ownership, or not. There was no evidence to show that Alois ever actually received any of the proceeds of the saloon ⁵⁵⁹ or liquor business, or that there was ever any accounting

between the father and son, or any balance stated in relation to a business wholly managed by the former and entirely separate and distinct from the cigar business of the son; and, while the liquor business must have been quite a considerable one, the books kept in it were not produced, showing the amount of profits gained, or what disposition or use had been made of them, beyond the purchase of the property in question. The testimony of Alois Barth in regard to the purchase of the real estate places whatever might otherwise be considered equivocal or ambiguous in a strong and clear light. He said his father managed the purchase of the real estate, and added: "I could not tell you any thing about that. It may be so. I don't know. I might have heard my father say something about it, but I never paid any attention to it. My mother might have spoken of it, but it has escaped my memory. I have enough to do to mind my own business." And yet he claims that he furnished the money to purchase the property, and that it was the proceeds of his liquor business; that he kept an account of the money in his mind, but in no other way. He says he was not present when the bargains were made for the property; that he did not attend to the buying of it, but his father might; that it might have been by some other person. "I don't know any thing about it. Q. You didn't have any interest in that? A. No." Although he subsequently said he had "some thing to say about the payment, and the manner in which it was to be made," but what he does not state, and that the deed was to be made in the name of his mother, but this may have been merely advisory.

The theory of the defense is that Alois gave his mother this money, part of the proceeds of the liquor business, with which the property in question was purchased; and it is claimed that the assignor, the husband, as against his ⁵⁰⁰ creditors, had a right to give Alois his exempt property, and his time as well in managing the business. As matter of law this is correct, and must be conceded: *Carhart v. Harshaw*, 45 Wis. 340; 30 Am. Rep. 752; *Allen v. Perry*, 56 Wis. 185; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757; *Mayers v. Kaiser*, 85 Wis. 332; 39 Am. St. Rep. 849. But an insolvent debtor cannot accumulate property under the cover of another's name, acting ostensibly as the agent of such other, and hold it as against his creditors; and, where such a claim is made, it is always a question of fact whether the business

actually belongs to such other person, or to the ostensible agent and debtor, and whether the alleged agency was a mere scheme and device to conceal and keep the property used in or gained by it from his creditors: *Feller v. Alden*, 23 Wis. 301; 99 Am. Dec. 173; *Hoxie v. Price*, 31 Wis. 82; *Dayton v. Walsh*, 47 Wis. 113; 32 Am. Rep. 757; *Mayers v. Kaiser*, 85 Wis. 394; 39 Am. St. Rep. 849; *Knapp v. Smith*, 27 N. Y. 280; *Abbey v. Deyo*, 44 N. Y. 347, 348.

Appellant's counsel relied on the case of *Mayers v. Kaiser*, 85 Wis. 382, 39 Am. St. Rep. 849, as controlling the present case, but that case is clearly distinguishable from this one. In that case it was clearly shown that the wife had a separate estate, in the use of which in business she acquired the means with which she purchased the real estate in dispute; and the fact that she employed her husband as her agent, on a salary, though an inadequate one, or he even gave her his services in managing the business, it was held, would not render the property liable to the claims of his creditors. Here the wife had no separate estate, and paid nothing for the property. The money with which it was purchased was given to her by her son, it is said; but we think the evidence satisfactorily shows that the title of the son to the liquor business and the money realized in it was simulated, and was fraudulent as against her husband's creditors, and that it was in fact her husband's money. It will not be contended that an insolvent husband might give his ⁵⁶¹ wife money with which to buy property, and that she could hold it as against his creditors; and yet the present case is not materially different. The trial judge heard the evidence of the witnesses, and found the claim of title of the defendant Anna Barth to the property in question fraudulent as against her husband's creditors, and that the money with which it was purchased was gained in a business conducted by him under the cover of the name of his son, and in order to fraudulently conceal and keep the same and its profits from his creditors. We concur in this conclusion, and hold that the judgment of the circuit court is correct.

By the COURT. The judgment of the circuit court is affirmed.

INSOLVENT DEBTOR.—FRAUD AS TO EXEMPT PROPERTY.—Creditors cannot rely upon any question of fraud in dealing with exempt property: *Frechling v. Bresnahan*, 61 Mich. 540; 1 Am. St. Rep. 617. A transfer of property exempt from execution cannot be fraudulent as against creditors: *Blair v.*

Smith, 114 Ind. 114; 5 Am. St. Rep. 593; though it be the conveyance of an exempt homestead by the husband to his wife: *Pike v. Miles*, 23 Wis. 164; 99 Am. Dec. 148.

HUSBAND AND WIFE—AGENCY.—A wife may constitute her husband her agent, but the question of agency is one of fact for the jury to determine: *Brown v. Thomson*, 31 S. C. 435; 17 Am. St. Rep. 40.

KENTZLER v. AMERICAN MUTUAL ACCIDENT ASSOCIATION OF OSHKOSH, WISCONSIN.

[88 WISCONSIN, 589.]

ACCIDENT INSURANCE—MEANING OF WORD “IMMEDIATELY” IN POLICY.—

The word “immediately” in a policy of accident insurance providing, as to accidents resulting in death, that notice shall be given and proof of death be made “immediately” after the accident occurs, that, unless such proof is furnished within six months thereafter, all claims shall be forfeited, and that the insurance shall not cover “disappearances,” means such a convenient time as is reasonably requisite for giving the notice after the discovery of death, and that the proof is to be furnished within the six months specified after such discovery.

WRITTEN INSTRUMENTS—RULE OF CONSTRUCTION—ABSURDITY OR REPUGNANCE.—If the ordinary meaning of the words employed in a written instrument leads to a manifest absurdity or repugnance they may, if the instrument as a whole will permit it, be varied or modified so as to avoid such inconvenience, but no further.

ACTION to recover the amount of an accident insurance policy. Kentzler was employed as an engineer on a tugboat under Capt. John Herbert, and lived and slept on the tug. He was a member of the defendant association, and had insurance therein against injuries. In case of injuries causing death, his policy for fifteen hundred dollars was payable to his daughter. The main features of the certificate of membership are stated in the opinion. On November 9, 1892, Kentzler disappeared. Shortly afterwards the bay in which the boat lay was frozen over, and on April 19, 1893, when the ice broke up, Kentzler's body was found in the bay near the boat. Search was immediately made for his daughter, who lived in another state, but she did not learn of her father's death until May 24, 1893, when she at once gave notice thereof to the company, and on July 12, 1893, furnished proofs of death, and demanded payment of the policy. On October 28, 1893, the daughter commenced this action through her guardian *ad litem*. The defense virtually claimed that the action was barred by the stipulation in the

contract as to furnishing proof of death within six months. The jury, by direction of the court, returned a verdict in favor of the plaintiff and assessed her damages at fifteen hundred dollars with interest. Defendant appealed.

M. C. Phillips, for the appellant.

Rossman & Foster, for the respondent.

⁵⁹³ CASSODAY, J. It may be fairly inferred from the circumstances attending the disappearance of Mr. Kentzler on the evening of November 9, 1892, and the finding of his body in the water of the bay, April 19, 1893, as mentioned in the foregoing statement, that as he went from the hotel to the tug for the purpose of retiring, and while in the act of stepping from the scow to the tug, he accidentally fell between the two into the water below, and was drowned. He was at the time about forty-six years of age, in good health and apparently sober, although he had taken a drink of whiskey while at the hotel, and it is said that he was in the habit occasionally of having a "spree." By the express terms of the contract it did "not cover disappearances." This being so, it is very manifest that had notice of his disappearance ⁵⁹⁴ been given to the defendant's secretary, November 10, 1892, and proofs of the circumstances under which he disappeared, with the suggestion that he had probably been drowned in the bay, been made out and sworn to and delivered to the secretary five months after Kentzler's disappearance, yet the defendant in all probability would have answered in the language of the contract: "This insurance does not cover disappearances," and hence you have no claim against the association. Such was the contract, that the defendant was subject to no liability "unless positive proof of death" was made within the time and in the manner prescribed in the certificate. But it was utterly impossible to make such proof or give such notice until the body was discovered and identified April 19, 1893. That was nearly six months after Kentzler had, in all probability, lost his life. Up to the time of such discovery and identification the beneficiary was in no default, and under no obligations to give such notice or furnish such proofs. But the contract expressly required notice to be given, "with full particulars of the accident and injury, immediately after the accident occurs." It also expressly required that "proof

of death, in like manner and time, shall be verified by the attending physician or some other person having personal knowledge of the fact; and, unless positive proof of death . . . shall be furnished to the association within six months of the date of the accident, then all claims thereon shall be forfeited."

A contract should not be construed so as to forfeit or render nugatory the rights of one of the parties to it unless the language employed imperatively requires such construction. In other words, an interpretation which gives effect is preferred to one which makes void. Besides, a contract should be interpreted in view of the conditions necessarily implied by law. It is a maxim in the law that "all words, whether they be in deeds, or statutes, or otherwise, ⁵⁹⁵ if they be general, and not express and precise, shall be restrained unto the fitness of the matter and person": *Webster v. Morris*, 66 Wis. 395; 57 Am. Rep. 278; *Brewer v. Blougher*, 14 Pet. 198. When the ordinary meaning of the words employed leads to a manifest absurdity or repugnance they may, if the instrument as a whole will permit it, be varied or modified so as to avoid such inconvenience, but no further: *Becke v. Smith*, 2 Mees. & W. 195; *Turner v. Sheffield etc. Ry. Co.*, 10 Mees. & W. 434. In the case at bar the contract must have a reasonable construction, and in view of the conditions so implied by law.

What is the object of giving such notice of the accident, injury, or death? In case of an injury or disability not resulting in death such notice affords the association an opportunity to ascertain the exact condition of the person and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice "immediately after the accident occurs"? Does it mean, in the language of Webster: "In an immediate manner; without the intervention of any thing; . . . without interval of time; without delay; instantly"? If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that, "The word 'immediately,' although in strictness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the

thing": 9 Am. & Eng. Ency. of Law, 931, citing numerous English and American cases in support of the proposition. The same language is quoted approvingly by Ryan, C. J., speaking for the whole court, in construing the words "immediate delivery," as used in section 2310 of the Revised Statutes, in *Richardson v. End*, 43 Wis. 318; ⁵⁹⁶ *Stevens v. Breen*, 75 Wis. 599. Applying this rule to the case at bar, the word "immediately" must be construed to mean such convenient time as was reasonably requisite for doing the thing required. That is to say, upon the discovery of the death, notice thereof was to be given in such convenient time as was reasonably requisite for doing so under the circumstances mentioned; and the proofs were to be furnished within the six months specified after such discovery. Besides, it is a maxim that the law does not require impossibilities. Thus, in the language of Hennen, J., "where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of, the particular contingency which afterwards happens": *Baily v. De Crespigny*, L. R. 4 Q. B. 185. To the same effect, *Taylor v. Caldwell*, 3 Best & S. 826; *Howell v. Coupland*, L. R. 9 Q. B. 462; on appeal, 1 L. R. Q. B. Div. 258; *Insurance Cos. v. Boykin*, 12 Wall. 433.

In the light of reason, as well as the authorities, we must hold that the action was not barred by the stipulation in the contract.

By the COURT. The judgment of the circuit court is affirmed.

ACCIDENT INSURANCE—NOTICE OF DEATH OR OF ACCIDENT.—Though a policy of insurance against accidental injury requires notice to be given in writing stating the full particulars of the accident and injury within ten days after injury or death, the failure to give such notice within the time specified does not absolve the insurer from liability if it was caused by the death of the party injured under such circumstances that it was not known until several days thereafter, and the notice was given within ten days after the discovery of his body and of the fact of his death; *Trippe v. President Fund Society*, 140 N. Y. 23; 37 Am. St. Rep. 529.

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ADMIRALTY.

1. **MARITIME CONTRACTS—STATE JURISDICTION.**—Contracts for the construction of vessels and water craft, and for the furnishing of materials therefor, before they are launched, are non-maritime. Liens and proceedings to enforce them are under state control, and may be enforced in state courts. *Globe Iron Works Co. v. Steamer "John B. Ketcham, 2nd,"* 464.
2. **STATE JURISDICTION—CONFLICT OF LAWS.**—A state law providing a lien and method for its enforcement in the state courts, for building vessels or water craft, and furnishing materials and machinery therefor before the vessel is launched, is not in conflict with the United States admiralty law. *Globe Iron Works v. Steamer "John B. Ketcham, 2nd,"* 464.

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ADVERSE POSSESSION.

1. **MISTAKE AS TO BOUNDARY.**—An adjoining owner who, by mistake, incloses or builds upon the land of his neighbor, intending to claim adversely to the real or true boundary only, does not thereby acquire a possession adverse or hostile to the true owner; but if he takes possession of the land under the belief and claim that it is his, he acquires an

adverse possession, even though the claim of title is the result of a mistake as to the boundary line. *Wilson v. Hunter*, 63.

2. MISTAKE AS TO BOUNDARY—INTENT.—The nature of the possession of an adjoining owner who incloses or builds upon the land of his neighbor depends upon the intent with which such possession is taken and held. To bar an action for the recovery of the land so held the possession must be actual, open, continuous, hostile, exclusive, and accompanied by an intent to hold adversely to, and not in conformity with, the rights of the true owner, and must continue for the full period prescribed by the statute of limitations. *Wilson v. Hunter*, 63.

3. NOTICE—STATUTE OF LIMITATIONS.—Undisturbed adverse possession of land under color of title raises a presumption of notice thereof, and constitutes a complete bar to an attack upon the title of the party in possession after the period prescribed by the statute of limitations has elapsed. *King v. Carmichael*, 303.

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1. POWERS OF ATTORNEY ARE STRICTLY INTERPRETED, and the authority is never extended beyond that which is given in terms, or which is necessary and proper for carrying the authority so given into full effect. *Campbell v. Foster Home Assn.*, 818.

2. POWER OF ATTORNEY TO SELL—AUTHORITY TO MORTGAGE.—A letter of attorney with naked authority to sell and convey, uncoupled with any interest in the land or fund, does not authorize the attorney in fact to execute a bond and mortgage in the name of the principal. *Campbell v. Foster Home Assn.*, 818.

3. POWER OF ATTORNEY TO SELL—AUTHORITY TO MORTGAGE.—A power of attorney to sell and convey real estate, not coupled with an interest, does not confer power to mortgage, and a mortgage executed under such a power is void. *Campbell v. Foster Home Assn.*, 818.

4. AUTHORITY OF AGENT TO EMPLOY ATTORNEY.—A general agent, with authority to make collections of cash and notes for his principal, has power to direct an attorney at law to bring suit, and to give a bond of indemnity in the name of such principal. *Stuart v. Morgan*, 786.

See BROKERS; FRAUDULENT CONVEYANCE, 2; HUSBAND AND WIFE, 2.

ALIENS.

See OFFICERS, 2, 3.

ALIMONY.

See MARRIAGE AND DIVORCE, 8-11.

ALTERATION OF INSTRUMENTS.

CONTRACT EXECUTED IN DUPLICATE.—If a lease is executed in duplicate, both the landlord and tenant retaining a copy, both copies are originals, and the fraudulent alteration by the tenant of the copy retained by him does not annul the lease, because the remaining copy is sufficient to sustain the contract between the parties. *Jones v. Heard*, 17.

AMENDMENTS.

See APPEAL, 3; LES PENDENS, 7, 8.

APPEAL.

1. QUESTIONS OF LAW NOT ARGUED IN THE SUPREME COURT ARE DENIED TO BE WAIVED. *Gulick v. Webb*, 720.
2. OBJECTION FIRST RAISED ON APPEAL.—An objection that plaintiff should have sued as administrator, instead of merely denominating himself the administrator of deceased, and also that he failed to show his official character by a proper proof of his letters of administration, cannot be raised for the first time in the appellate court, but should be taken advantage of by way of motion in the lower court. *Texarkana Gas etc. Co. v. Orr*, 30.
3. AMENDMENT TO CONFORM TO PROOF.—If an action by an administrator for the death of his intestate, caused by negligence, is erroneously brought for the benefit of the estate, instead of for the widow and next of kin, the appellate court must, in the absence of demurrer, treat the case as it was treated by the parties in the court below, as being a claim by the administrator for injury to the deceased in his lifetime, and consider the complaint as amended to correspond with the proof. *Texarkana Gas etc. Co. v. Orr*, 30.
4. JURY TRIAL—ERRONEOUS CONDUCT OF COUNSEL IN ARGUMENT.—Language used by counsel which evinces a studied purpose to arouse the prejudice of the jury, based upon facts not in the case, is ground for the reversal of the verdict and judgment. *Cluett v. Rosenthal*, 446.
5. JURY TRIAL—INSTRUCTIONS.—It is not error for the court to refuse to give an instruction fully covered in the general charge. *Gibson v. Minneapolis etc. Ry. Co.*, 482.
6. A VERDICT WILL NOT BE DISTURBED ON APPEAL if there is any evidence to support it. *Gibson v. Minneapolis etc. Ry. Co.*, 482.
7. APPEAL FROM JUDGMENT MODIFIED ON APPEAL.—An order of the trial court modifying a judgment in accordance with the directions of the supreme court made on a prior appeal, and the judgment as modified, are both appealable, and appeals taken therefrom will not be dismissed on the ground that they are frivolous. *Randall v. Duff*, 79.

See BILLS OF REVIEW; CERTIORARI; HABEAS CORPUS, 1.

APPRAISEMENT.

See EXECUTORS AND ADMINISTRATORS, 2.

APPROPRIATION.

See WATERS, 10, 11.

ARCHITECT.

See BUILDING CONTRACTS.

ARREST.

1. PROBABLE CAUSE FOR EXISTS if there is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person about to be arrested is guilty of the offense charged. *People v. Kilvington*, 73.

2. **PROBABLE CAUSE FOR—SUBMISSION OF FACTS TO JURY.**—In the event of conflicting evidence as to the facts of an arrest, it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts. *People v. Kilvington, 73.*
3. **PROBABLE CAUSE—QUESTION OF LAW.**—If a police officer, intending to arrest a person, kills him the question whether he had probable cause to believe, or reasonable grounds for suspicion, that the deceased had committed a felony, is one of law for the court, where the facts are undisputed. *People v. Kilvington, 73.*
4. **A PEACE OFFICER HAS THE RIGHT,** without a warrant, to arrest any person in the night, when he has reasonable ground to believe that such person has committed a felony. *People v. Kilvington, 73.*
5. **ARREST OF FLEEING PERSON—EVIDENCE.**—If a police officer not recognizing a fleeing person, and not knowing any thing about his business, shoots him while attempting to effect an arrest, evidence tending to show that the deceased went on the particular night to the place near where he was shot on lawful business is irrelevant and inadmissible. *People v. Kilvington, 73.*
6. **ARREST OF FLEEING PERSON CHARGED WITH THEFT.**—The circumstance that a person is fleeing at night from one who is shouting "stop thief" affords a police officer as much reason to suspect or believe that he may have committed robbery, or burglary, or grand larceny, as that he may have merely committed petit larceny, and justifies an attempt to arrest. *People v. Kilvington, 73.*
7. **ARREST OF FLEEING PERSON—SHOOTING—CRIMINAL NEGLIGENCE.**—Whether the act of a police officer in shooting a fleeing person at night in attempting to effect his arrest is or is not an act of criminal negligence is a question for the jury, who must give the officer, upon the trial of an information for murder, the benefit of any reasonable doubt arising upon the evidence. *People v. Kilvington, 73.*

See HOMICIDE, 5.

ASSIGNMENT.

1. **ASSIGNMENT OF PART OF CLAIM, DEMAND, OR OBLIGATION** may be made, and the courts will recognize and protect the equitable interest of the assignee. *Schilling v. Mullen, 475.*
2. **NOTICE OF AN ASSIGNMENT OF A DEMAND OR OBLIGATION,** or a part thereof, given to the debtor, fixes the rights of the parties, and protects the assignee. *Schilling v. Mullen, 475.*
3. **GARNISHMENT.**—AN ASSIGNMENT OF A DEMAND IS GOOD and sufficient as against a subsequent garnishment, if such assignment was binding upon the assignor. *Metcalf v. Kincaid, 391.*
4. **ASSIGNMENT OF PART OF DEMAND—NOTICE—PAYMENT.**—A debtor making payment in full to his creditor after notice that a part of the obligation has been assigned is still liable to the assignee for his share of the claim. *Schilling v. Mullen, 475.*
5. **ASSIGNMENT OF PART OF CLAIM—ACTION.**—If part of an obligation or demand has been assigned the assignee can maintain an action to recover his share by joining the assignor and assignee as plaintiffs; or, if the former does not join, by making him a defendant, so that the whole controversy may be settled in one suit. *Schilling v. Mullen, 475.*

6. **ASSIGNMENT OF WAGES—WHAT SUFFICIENT.**—A letter or order directed to the auditor of a railway corporation requesting him to pay to a person named therein the salary of the writer during the ensuing six months, accepted and partly acted upon by the corporation, is a sufficient assignment of such wages, if they thereafter accrue. All that is necessary to accomplish an assignment is that the intent to assign appear from the writing or otherwise. The form is of little moment. *Metcalf v. Kincaid*, 391.
7. **AN ASSIGNMENT OF FUTURE EARNINGS** is sufficient to vest them in the assignee as against attaching creditors, though there was no contract of employment for any definite length of time, if the assignor was actually at work at the time, under an engagement then existing at a fixed price, under which he might reasonably expect to earn wages in the future. *Metcalf v. Kincaid*, 391.

See HOMESTEAD, 8; LANDLORD AND TENANT, 2.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. **BY CORPORATION.**—An insolvent corporation has a right to make an assignment in trust for the benefit of its creditors, and may exercise such right to the same extent and in the same manner as a natural person, unless restricted by its charter or some statutory provision. *Worthen v. Griffith*, 50.
2. **WITHHOLDING ASSETS.**—The withdrawal by a director of a corporation of a portion of its assets for his own use at a time when the corporation is hopelessly insolvent, and in contemplation of an assignment for the benefit of creditors, does not of itself render a subsequent partial assignment void, if the assignment does not tend in any way to promote or cover up the acts of such director in reference to the withdrawal of such assets. *Worthen v. Griffith*, 50.
3. **BY CORPORATION—ASSETS AS TRUST FUND.**—In those states where an insolvent corporation may make preferences among its creditors by assignment the rule that the property of the corporation is a trust fund in the hands of its directors as a specific lien or direct trust does not prevail, and it is only when a court of equity, at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of the corporation, that such assets constitute a trust fund for its creditors. *Worthen v. Griffith*, 50.
4. **PREFERENCES.**—An assignment by an insolvent corporation for the benefit of creditors is not rendered void from the fact that on the day the assignment was instituted the corporation confessed judgment in favor of *bona fide* creditors preferred in the assignment, and then entered its appearance in an action by the assignee and such creditors, with consent that the assignee should be appointed receiver of the assigned property, so that it might be sold under order of court on terms prohibited by the statute regulating assignments. *Worthen v. Griffith*, 50.
5. **PREFERENCES.**—A corporation having the right to prefer one or more of its creditors may do so by assignment, mortgage, or judgment, or by a combination of these methods, so long as no fraud is perpetrated under the pretense of securing the debt. *Worthen v. Griffith*, 50.
6. **BY CORPORATION—PREFERENCE TO DIRECTOR.**—A corporation having the right to prefer its creditor by assignment may thus prefer a just debt due from it to one of its directors. *Worthen v. Griffith*, 50.

- 7. BY CORPORATIONS—PREFERENCE TO DIRECTORS.**—An assignment for the benefit of creditors by an insolvent corporation with preferences is not void from the fact that two of its directors are liable as indorsers on notes constituting part of the indebtedness of the corporation preferred by the assignment. *Worthen v. Griffith*, 50.

ASSOCIATIONS.

- 1. UNINCORPORATED ASSOCIATIONS—ACTIONS BY PARTIES.**—In cases of unincorporated associations whose membership is large, suits may be brought by some of the members in their own names on behalf of, or as representing all, or in the name of the association by certain of its members. The former form is preferred. *Liederkrans Singing Soc. v. Germania Turn Verein*, 798.
- 2. UNINCORPORATED ASSOCIATIONS—PROPERTY RIGHTS, HOW DECIDED.**—A contention between the members of an unincorporated association as to the present right of possession of its property must be decided by the constitution and by-laws of the association, or, in the absence of any sufficient provision therein, by the majority of the members. The right of possession in such case is generally joint and not several. *Liederkrans Singing Soc. v. Germania Turn Verein*, 798.

See CORPORATIONS, 8; MINES.

ASSUMPSIT.

See WHARVES, 2.

ATTACHMENT.

- 1. GARNISHMENT—WHEN NOT MAINTAINABLE.**—A plaintiff in garnishment can obtain no greater beneficial relief against the garnishee than the judgment debtor is entitled to; and, if the debtor's recovery is limited to a mere legal title, without beneficial interest or right of enjoyment in himself, the proceeding must fail. *Marx v. Parker*, 849.
- 2. GARNISHMENT OF TRUST FUNDS.**—A judgment creditor cannot have his debt satisfied out of property held in trust for another, no matter how completely his debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given. *Marx v. Parker*, 849.
- 3. GARNISHMENT OF TRUST FUNDS.**—Moneys belonging in equity to a city, but deposited in bank by one of the city's officers in his individual name, cannot be garnished in a suit against him by his individual creditors. *Marx v. Parker*, 849.
- 4. GARNISHMENT OF TRUST FUNDS.**—A public officer of a city, though required to give bond for the proper payment of moneys coming into his hands officially, is a bailee and not a mere debtor of the city, and, although he deposits such moneys in bank in his individual name, they cannot be garnished at the suit of his individual creditors. *Marx v. Parker*, 849.
- 5. GARNISHMENT—INTERVENTION.**—Although a bank summoned as a garnishee sets up that it has an account with the judgment debtor as a depositor, but that the money thus on deposit belongs to a city having been collected by the judgment defendant in his official capacity as marshal of such city, and held by the bank as such, it is error for the court, of its own motion, to require the city to appear as an intervenor. *Marx v. Parker*, 849.

2. **GARNISHMENT—WAIVER.**—A garnishee defendant waives his right to have the case tried as against him at the term at which judgment is rendered against the principal defendants, by noticing the case for a subsequent term, and in that term consenting that it be continued. The case must thereafter proceed as other issues of fact, subject to notice by either party. *Cluett v. Rosenthal*, 446.

See CORPORATIONS, 14.

ATTORNEY AND CLIENT.

1. **AUTHORITY TO GIVE INDEMNITY.**—An attorney employed to bring suit has authority to take all steps necessary in the regular course of the litigation, and may give a bond of indemnity in his client's name. *Swartz v. Morgan*, 786.
2. **RIGHT OF ATTORNEY TO SUBSTITUTION.**—If the attorneys representing a banking corporation are dismissed upon a change of its officers, and a new attorney appointed, he is entitled to be substituted as attorney in a prohibition proceeding by the bank to prevent the appointment of a receiver in a creditor's suit against it. The bank has a right to dismiss such proceeding, and the attorneys dismissed cannot object that the new attorney was retained for that purpose, or that he was also attorney for the receiver. *People's Home Sav. Bank v. Superior Court*, 147.
3. **PRIVILEGED COMMUNICATIONS.**—Communications by several persons who employ the same attorney in the same business, made by them to such attorney in relation to such business, while privileged as to their common adversary, are not privileged as between themselves. *Scip's Estate*, 803.
4. **PRIVILEGED COMMUNICATIONS.**—An attorney employed by the husband of one of three sisters equally interested in the subject matter of litigation is competent to testify in a subsequent contest between the sisters, involving the same matter, as to who were the partners he represented, and as to the declarations of the husband made during his lifetime, showing for whom he acted in employing the attorney and managing the litigation. *Scip's Estate*, 803.

See AGENCY, 4.

ATTORNEY'S FEES.

See HUSBAND AND WIFE, 5.

BAIL.

- BAIL IN CIVIL ACTIONS — AFFIDAVIT — WHEN MUST BE OBJECTED TO.**—An affidavit prescribed by statute to hold a defendant to bail in a civil action is a part of the process to bring him into court. Any objection to it on the ground of defect, deficiency, or irregularity may and must be taken advantage of by the defendant in the first instance before he has given bail or entered appearance. If he fails to do so he must be considered to have waived his objection, and neither he nor his bail can afterward avail himself of the objection. *Sedgewick v. Houston*, 165.

BAILMENT.

1. **SALE OR BAILMENT.**—A person who receives goods under an agreement by which he is to keep them a certain period, and, if he pays for them, is to become the owner, but otherwise is to pay for the use of them, receives them as a bailee only, and the property in them is not changed until the price is paid. *Brown v. Billington*, 780.

2. **SALE OR BAILMENT.**—A dealer who receives goods under an agreement to hold them in trust for another as the property of the latter, with liberty to sell on his account, and to hand the proceeds to him to apply on the purchase price, and for the payment of any other indebtedness due from the dealer, takes no property in the goods, and they are not liable for his other debts. *Brown v. Billington*, 780.
3. **NEGLIGENCE—EVIDENCE OF.**—IN AN ACTION AGAINST A BAILEE for loss and damage to property by accident, proof of the accident may afford *prima facie* proof of negligence. *Wintringham v. Hayes*, 725.
4. **BAILOR AND BAILEE—BURDEN OF PROOF AS TO CARE.**—If a bailor proves the condition in which he delivered his property to the bailee, the nature of subsequent injuries suffered by it, and that they were not the result of ordinary wear and tear, he makes out a *prima facie* case, and the burden of proof shifts to the bailee if he had the property within his exclusive control, and he must be held answerable for such injuries, unless he can show that they were not the result of his want of proper care. *Wintringham v. Hayes*, 725.

See RAILROADS, 7.

BANKS.

1. **COLLECTIONS—TRUSTS.**—A transaction by which a draft is sent to a bank for collection and remittance, collected and the proceeds placed in its vaults by the bank, it merely forwarding a draft in payment, establishes, as between the correspondent and the bank, the relation of debtor and creditor, and not that of *cestui que trust* and trustee. *Bowman v. First Nat. Bank*, 870.
2. **TRUST FUNDS.**—Funds in the hands of a bank not impressed with a trust at the time the bank ceases to do business are not impressed with a trust in the hands of the receiver of such bank. *Bowman v. First Nat. Bank*, 870.
3. **A BANK INDORSING AND COLLECTING A CHECK WARRANTS THE GENUINENESS OF ALL THE PRE-EXISTING INDORSEMENTS** thereon, including the indorsement of the respective payees named in such check, and is answerable for moneys received by it if any of such indorsements are forgeries. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
4. **BILLS OF EXCHANGE AND CHECKS.**—THE ACCEPTANCE OF A CHECK DOES NOT PROVE OR ADMIT THE GENUINENESS OF ANY SIGNATURE THEREON other than that of the drawer, and will not exonerate from liability a bank subsequently collecting such check or bill by virtue of a forged indorsement, though such indorsement was not made by it or with its knowledge or procurement. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
5. **FORGED INDORSEMENTS.**—The drawee of a check is bound to know the signature of his own customers, but is not bound to know any other signature thereon, and by accepting or paying a bill or check does not admit the genuineness of any indorsement of it. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
6. **A BANK PAYING A CHECK ON A FORGED INDORSEMENT IS ENTITLED** to recover the money so paid from the person receiving it, on making demand within a reasonable time after the discovery of the forgery. *First Nat. Bank v. Northwestern Nat. Bank*, 247.

See CHECKS; EVIDENCE, 5.

BENEFICIARIES.

See INSURANCE, 11, 12, 14.

BENEFIT ASSOCIATIONS.

See INSURANCE, 6-14.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BILLS OF EXCHANGE.

See BANKS, 4; CHECKS, 1; NEGOTIABLE INSTRUMENTS.

BILLS OF REVIEW.

1. **REVIEW OF DECREE.**—A bill to review a decree of divorce, on the ground of alleged errors of law apparent on the face of the record, may be filed without first obtaining leave of court; but an erroneous order of court to strike the bill from its files should not be reversed, unless prejudicial to the appellant. *Wood v. Wood*, 42.
2. In an attack upon a decree by a bill of review for errors of law, the court cannot examine the evidence to see whether the decree is based upon a correct finding of facts. In such case it is the sole duty of the court to inquire whether the record, exclusive of the evidence, contains any substantial error of law pointed out by the bill. *Wood v. Wood*, 42.

BONDS.

1. **COUPONS—NEGOTIABILITY.**—Interest-bearing coupons attached to bonds payable to bearer are, in legal effect, promissory notes, and possess all the attributes of negotiable paper. *Trustees v. Lewis*, 209.
2. **COUPONS—NEGOTIABILITY—INTEREST.**—Interest-bearing coupons attached to bonds and payable to bearer may be detached and negotiated separately by simple delivery, and sued on separately from the bond after the latter has been paid, as well as before. Such coupons once detached and negotiated cease to be mere incidents of the bond, and become independent claims, carrying interest after maturity. *Trustees v. Lewis*, 209.
3. **PAYMENT OF BEFORE MATURITY—FAILURE TO TAKE UP COUPONS.** The payment or cancellation of bonds before maturity to the holder thereof does not affect the interest-bearing coupons payable to bearer, and detached from the bonds, and transferred before maturity to, and in the hands of, another *bona fide* holder. *Trustees v. Lewis*, 209.
4. **NEGOTIABLE INSTRUMENTS—PAYMENT—FAILURE TO TAKE UP—COUPONS.** A negotiable instrument paid before maturity should be surrendered to the payer to prevent further negotiation, for, if payment is made to the original payee and the instrument is not surrendered, but has been, or is thereafter, transferred before maturity to a *bona fide* holder, without notice, such holder can recover thereon against the maker notwithstanding such payment. This rule is here applied to interest coupons detached from bonds and payable to bearer. *Trustees v. Lewis*, 209.

See ATTORNEY AND CLIENT, 1; OFFICERS, 7-9.

BOOKS OF ACCOUNT.

See EVIDENCE, 8, 12.

BOUNDARIES.

1. A GRANT OF LAND BORDERING UPON A RIVER carries the exclusive right and title in the river to the center thereof, subject to the right of passage in the public, unless the terms of the grant specially indicate an intention on the part of the grantor to confine the grantee to the edge or margin. *Chicago v. Van Ingen*, 285.
2. IF TOWN LOTS ARE SOLD AND CONVEYED BY A MAP REPRESENTING THEM AS FRONTING UPON A STREAM of water or designating such stream as one of their boundaries, the purchaser becomes the owner of the fee to the center of the stream, with the right to maintain docks or wharves out to the line of navigability. Of this right he cannot be divested without compensation first being made. *Chicago v. Van Ingen*, 285.

See WATERS, 5.

BROKERS.

WHEN ENTITLED TO COMMISSION — FAILURE OF TITLE.—If an agent to sell land agrees to pay a commission to a broker for procuring a purchaser, and one is obtained, he is liable for the commission, though it is then discovered that the land does not belong to the principal. Such a mistake is not, in law, a mutual mistake which will avoid the contract to pay a commission on the sale. *Barthell v. Peter*, 906.

BUILDING CONTRACTS.

ARCHITECT, DECISION OF, WHEN FINAL.—If the parties to a building contract agree that the architect shall pass upon the work and certify upon the payments to be made his decision is binding, and can be attacked only for fraud or evident mistake. If, in such a contract, provision is made for payment of the price upon presentation of the architect's certificate, the obtaining of such certificate is a condition precedent to the right to require payment, and to maintain an action therefor in case payment is refused on the architect's certificate as to delay in performing work, and as to the damages recoverable therefor. If a building contract specifies that the decision of the architect shall be binding in case of any disagreement between the parties relating to the performance of any covenant therein, and that damages shall be allowed for the nonperformance of the contract at the sum of fifty dollars for each and every day the work remains undone after a date named therein, which sum should be deducted from the contract price, the architect is empowered to determine the extent to which delay was due to the fault of the contractor, and to deduct from the amount of his certificate the fifty dollars for each day's delay for which he finds the contractor chargeable. *Hennessey v. Metzger*, 267.

See DAMAGES, 7.

BURDEN OF PROOF.

See BAILMENT, 4.

BY-LAWS.

See CORPORATIONS, 3-5.

CARRIERS.

1. **THE LIABILITY OF A CARRIER AS SUCH IS NOT PREVENTED FROM ATTACHING** by the fact that it is not ready to perform its duty and retains the property in its possession because not then able to provide the means of transportation. *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 752.
2. **CARRIERS OF LIVESTOCK—NEGLIGENCE—SUFFICIENCY OF PLEADING AND PROOF.**—In an action by a shipper of livestock against a railroad company to recover the value of an animal lost a declaration which alleges both delay in the transportation and failure to furnish an opportunity for feeding and watering the stock justifies a recovery upon proof of omission on the part of the company to furnish an opportunity to the shipper to feed and water the stock, although the company is not liable for the delay. *Smith v. Michigan Cent. R. R. Co.*, 440.

See ELEVATORS; RAILROADS, 5-8.

CERTIORARI.

CERTIORARI AS WRIT OF REVIEW.—The writ of *certiorari* cannot be used to serve the purpose of a writ of error or appeal with bill of exceptions. The granting of the writ is not a matter of right, but in the legal discretion of the court; and, in order to review and quash the proceedings of an inferior tribunal upon such writ, the court must have proceeded in the case without jurisdiction, or its procedure must have been clearly illegal, or unknown to the law, or essentially irregular.—*Hunt v. Jacksonville*, 214.

CHATTEL MORTGAGES.

1. **A DESCRIPTION IN A CHATTEL MORTGAGE IS SUFFICIENT** if it will enable third persons, aided by the inquiries which the instrument indicates and directs, to identify the property.—*Andregg v. Brunskill*, 388.
2. **THE DESCRIPTION IN A CHATTEL MORTGAGE** referring to the ownership or location of the property mortgaged is of great importance, and the omission of these data may leave imperfect and void a description, which, were they present, might properly be sustained. *Andregg v. Brunskill*, 388.
3. **A DESCRIPTION OF PROPERTY MORTGAGED** as "fourteen steers one year old, crop off left ear, and slit in the same ear; four heifers one year old, marked on ear as above steers," without any reference or statement respecting the location or ownership of the property, is insufficient and void. *Andregg v. Brunskill*, 388.

See EVIDENCE, 12; FRAUDULENT CONVEYANCES, 2.

CHECKS.

1. **BANKING.**—A CHECK PAYABLE TO ORDER is a bill of exchange payable to order on demand. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
2. **DILIGENCE AS TO PRESENTMENT.**—The rule of diligence as between indorsee and indorser is the same as between payee and drawer. Hence the indorser of a check is not liable thereon if it is not presented for payment within a reasonable time after its indorsement and delivery. *Gifford v. Hardell*, 925.
3. **COMMENCEMENT OF REASONABLE TIME FOR PRESENTATION.**—As between the indorsee and indorser of a check the period of reasonable time for

presentation begins when the check is delivered to the indorsee or to his agent. *Gifford v. Hardell*, 925.

4. **DILIGENCE AS TO PRESENTMENT IN DISTANT PLACE.**—The general rule of diligence as to the presentation of a check received in a place distant from that of the bank upon which it is drawn is, that the check must be forwarded to the latter place on the next secular day after its receipt, and be presented for payment on the day after it has reached such place by due course of mail. *Gifford v. Hardell*, 925.

5. **PERIODS FOR PRESENTATION.**—Each indorsee of a check is allowed the same period of time for presentation for payment, as between himself and his immediate indorser, that the payee had as between himself and the drawer. *Gifford v. Hardell*, 925.

See **BANKS**, 4-6; **NEGOTIABLE INSTRUMENTS**, 4.

CHOSSES IN ACTION.

See **EXECUTORS AND ADMINISTRATORS**, 1.

CLOUD ON TITLE.

ACTIONS—PARTIES—DOWER.—A widow claiming a dower interest in lands conveyed by her husband in his lifetime by deed in which she did not join, and subsequently sold for taxes, is a necessary party to an action to quiet title to the land. *Thompson v. McCorkle*, 334.

COLLATERAL ATTACK.

See **EXECUTORS AND ADMINISTRATORS**, 3, 5; **JUDGMENTS**, 3, 11; **MARRIAGE AND DIVORCE**, 3-5; **MORTGAGE**, 13; **PATENTS**, 5-7; **PUBLIC LANDS**, 1.

COLLATERAL SECURITY.

See **DURESS**, 2.

COLLUSION.

See **JUDGMENTS**, 9, 11-13; **MARRIAGE AND DIVORCE**, 5.

COMMISSIONERS.

See **STATES**, 3, 4.

COMMISSIONS.

See **BROKERS**.

COMMON CARRIERS.

See **CARRIERS**.

COMMON LAW.

See **RELEASE**.

COMPENSATION.

See **OFFICERS**, 5.

COMPOUNDING FELONY.

DURESS.—The maker of a promissory note cannot avoid payment thereof on the ground that it was given to compound a felony. *City Nat. Bank v. Kusorn*, 880.

COMPROMISE.

See CONTRACTS, 13; WILLS, 1-5.

CONCEALMENT.

See FRAUDULENT CONVEYANCES.

CONFLICT OF LAWS.

See EXECUTION, 1; EXECUTORS AND ADMINISTRATORS, 9-11; MARRIAGE AND DIVORCE, 3.

CONSIDERATION.

See CONTRACTS, 5.

CONSTITUTIONAL LAW.

1. "DUE PROCESS OF LAW" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing, or an opportunity to be heard, prior to judgment, is absolutely essential. *State v. Billings*, 525.

2. DUE PROCESS OF LAW—RESTRICTING POWER TO CONTRACT.—The right to contract necessarily includes the right to fix the price at which labor will be performed and the mode and time of payment; and a statute which restricts a person as to either of these essential elements of the right to contract to a mode different from that enjoyed by the community at large deprives him of liberty and property without "due process of law." *Low v. Rees Printing Co.*, 670.

See INSANE PERSONS; LEGISLATURE; STATUTES, 1-4; WITNESSES, 4-7.

CONSTRUCTION.

See CONTRACTS, 7; STATUTES.

CONTEMPT.

REFUSAL TO ANSWER QUESTIONS—HABEAS CORPUS.—A witness who refuses to answer questions propounded to him concerning violations of the Purity of Election Law by other persons with whom he has co-operated may be lawfully committed for contempt until he shall answer, and is not entitled to discharge upon *habeas corpus*, if so committed. *In parte Cohen*, 127.

CONTRACTS.

1. WHEN PERFECT THOUGH THE PARTIES CONTEMPLATE ITS BEING REDUCED TO A MORE FORMAL WRITING.—If the correspondence and telegrams between the parties contain all the details of a contract it is enforceable though they intended that their agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what already had been agreed upon. Neither party has the right to insist that such agreement should contain terms not stated in the correspondence and telegrams, and if he does so insist, and refuses to sign the agreement or perform the contract without such additional terms, he is answerable for the damages sustained by his withdrawal from his contract. *Sanders v. Pottlitzer Bros. Fruit Co.*, 757.

2. A CONTRACT TO MAKE AND EXECUTE A CERTAIN WRITTEN AGREEMENT, the terms of which are mutually understood and agreed upon, is in all
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- respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be if executed. Neither party is at liberty to refuse to perform or to enter into the agreement as stipulated. *Sanders v. Pottlitzer Bros. Fruit Co.*, 757.
3. **TIME AS ESSENCE OF.**—In equity time is not regarded as of the essence of a contract unless expressly stated to be so. *Chabot v. Winter Park Co.*, 192.
 4. **TIME, WHEN ESSENCE OF.**—If a party to a contract for the sale of lands is guilty of laches and negligence in performing, and the time for performance has passed, the other party may, by giving notice, fix a reasonable time for the performance of the contract, and has a right to treat it as abandoned if performance is not completed in such reasonable time. *Chabot v. Winter Park Co.*, 192.
 5. **CONSIDERATION OF LEASE—DETRIMENT TO LESSOR.**—The consideration for a lease may as well consist in detriment due the lessor as in profit due the lessee. Hence, if the possession of a company's electric light and gas plant, and the use thereof, are transferred by a lease for two years, under which the lessee is to take possession, manage, control, and operate the property, and to pay the company every three months during the term all the receipts of the business, less all necessary charges and expenses, the contract is supported by a sufficient consideration, though the lessee is not benefited by the contract. *Visalia Gas etc. Co. v. Sims*, 105.
 6. **AMBIGUITY.**—If a written order for the purchase of a chattel contains the words "note for one hundred and ten dollars; three fall payments at eight per cent," the time of payment is uncertain and ambiguous, and the order is incomplete on its face. *Aultman v. Clifford*, 478.
 7. **WRITTEN INSTRUMENTS—RULE OF CONSTRUCTION—ABSURDITY OR REPUGNANCE.**—If the ordinary meaning of the words employed in a written instrument leads to a manifest absurdity or repugnance they may, if the instrument as a whole will permit it, be varied or modified so as to avoid such inconvenience, but no further. *Kentzler v. American etc. Accident Assn.*, 934.
 8. **STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.**—An agreement by a creditor to forbear the enforcement of his debt is not a sufficient consideration to support an oral promise of a third person to pay that debt, although such third person makes the promise for the purpose of subserving and promoting his own pecuniary interests. *McKenzie v. Puget Sound Nat. Bank*, 844.
 9. **STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.**—A consideration to support an oral promise to pay the debt of another to be valid must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee independent of the original debt, which obligation is to be discharged by the payment of that debt. *McKenzie v. Puget Sound Nat. Bank*, 844.
 10. **TORT, BREACH OF CONTRACT WHEN MAY AMOUNT TO.**—If one person owes another a duty the breach of which is a tort, the fact that the former has expressly contracted with the latter for the performance of such duty does not render its breach any the less a tort, but, if the duty is imposed or created by the contract and otherwise did not exist, its breach is not a tort. *Russell v. Polk County Abstract Co.*, 381.

11. **EVIDENCE, CONTRACT TO PROCURE.**—A contract is void as against public policy if by it one of the parties agrees to secure such testimony as will enable the other to win an existing or contemplated suit. It is not necessary that the contract should contemplate the production of perjured testimony. It is void because its tendency is to promote unlawful acts. *Quirk v. Muller*, 647.
 12. **CONTEST OF WILL—CONTRACT NOT TO CONTEST, HOW AFFECTED BY PUBLIC POLICY—ENFORCEMENT OF CONTRACTS.**—An heir's covenant not to contest the will of his ancestor is not void as against public policy, or the policy of the law that an invalid will shall not be established as a valid will; but is in harmony with the paramount public policy that parties of full age and competent understanding shall have liberty to contract, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. *In re Estate of Garcelon*, 134.
 13. **A CONTRACT NOT TO CONTEST A WILL IS ONE THAT CONCERNS PRIVATE PARTIES ALONE.**—It is not against public policy, and is as much entitled to be enforced as a valid compromise of the contest of a will, which, when fairly made, is always enforced. *In re Estate of Garcelon*, 134.
- See **ADMIRALTY; CONSTITUTIONAL LAW; LIMITATIONS OF ACTIONS, 5; MUNICIPAL CORPORATIONS, 2-4; STATES, 2-5; STATUTES, 2, 3.**

CONVEYANCES.

See **DEEDS; MORTGAGES.**

CORPORATIONS.

1. **STOCKHOLDERS—LIABILITY ON STOCK SUBSCRIPTIONS.**—The fact that part of the stock of a corporation has been illegally subscribed by another corporation, all of the remaining subscribers for stock having taken with knowledge of that fact, and having paid part of their subscription to enable the corporation to commence business, cannot be successfully asserted by them to escape liability on their stock subscriptions in an action against them by the creditors of the corporation. *Cole v. Satsop R. R. Co.*, 858.
2. **STOCKHOLDERS—LIABILITY FOR STOCK SUBSCRIPTIONS MADE BY THEM THROUGH TRUSTEES.**—Under a complaint alleging that stock in a corporation has been subscribed for by a party as "trustee," who, in making such subscriptions, has acted as agent for certain subscribers at their request, and for the benefit of each of them in proportion to his individual subscription, the creditors of the corporation may maintain an action against the real parties in interest to recover the amount of their subscriptions, and, without alleging fraud, may show by parol evidence that the subscription is in fact other than what upon its face it appears to be. *Cole v. Satsop R. R. Co.*, 858.
3. **BY-LAWS—PROXIES.**—If the statute allows stockholders of a corporation to be represented at all elections by proxies of their own selection, a by-law of a banking corporation, providing that no proxy shall be voted by any one not a stockholder of the corporation, is void, as being an infringement upon the statute. *People's Home Sav. Bank v. Superior Court*, 147.
4. **LIMITATION UPON BY-LAWS.**—A by-law cannot take away, or even abridge, the substantial rights of a stockholder of a corporation. *People's Home Sav. Bank v. Superior Court*, 147.

6. **STATUTES—BY-LAWS AUTHORIZING A MODE OF VOTING BY PROXY.**—A statute authorizing a corporation to provide in its by-laws for “the mode of voting by proxy” refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, and does not authorize the curtailing of the right to vote by proxy, but only to regulate the exercise of the right by requiring the authority to be in writing, properly witnessed, acknowledged, and filed with the records, etc. *People’s Home Sav. Bank v. Superior Court*, 147.
6. **WHAT HAVE NO VALIDITY.**—A corporation whose primary object is without statutory authority can have no lawful existence, although some of its declared purposes may be lawful. Hence, if its primary object is to obtain money from its members, it is unauthorized, although its declared purposes are “to encourage frugality and economy in its members; to create, husband, and distribute funds from monthly installments, dues, or investments from its members; to purchase, take, hold, sell, convey, lease, rent, and mortgage real estate and personal property; to loan surplus accommodations; and to carry on and conduct a general investment business.” *State v. International Investment Co.*, 920.
7. **PURPOSES NOT EXTENDED BY GENERAL WORDS OF STATUTE.**—Under a statute authorizing the formation of corporations for certain designated purposes the general words “or for any lawful business or purpose whatever, except,” etc., extend only to things of a nature kindred to those specifically mentioned. *State v. International Investment Co.*, 920.
8. **ULTRA VIRES.**—A CONTRACT, WHEREBY A GUARANTY LIFE ASSOCIATION UNDERTAKES to pay losses which may accrue against another and similar association, is an attempt to divert the funds to objects not authorized by its charter, and is therefore *ultra vires* and void. *Twiss v. Guaranty Life Assn.*, 418.
9. **IF AN ULTRA VIRES CONTRACT IS PERFORMED BY ONE SIDE**, the other contracting party cannot be permitted to enjoy the benefits received, and will be required in a proper action to account; but one whose condition has not changed or been prejudiced by the *ultra vires* contract cannot compel its enforcement. *Twiss v. Guaranty Life Assn.*, 418.
10. **CONTRACT ULTRA VIRES—PUBLIC POLICY.**—If a municipal corporation grants to an electric light and gas company a franchise to operate its works, and to supply the inhabitants of the city with gas and electricity, it is bound to operate its works, and has no power to lease them to a third party for a period of years. Such a contract, if made, is *ultra vires* and void as against public policy. *Visalia Gas etc. Co. v. Sims*, 105.
11. **VOID CONTRACT — RELIEF — PLEADING — ESTOPPEL.**—A court will not relieve either party to a contract with a corporation, which is not only *ultra vires*, but also void as against public policy, and performance of the contract by one of the parties will not estop the other from pleading its invalidity. *Visalia Gas etc. Co. v. Sims*, 105.
12. **ACCOUNTING FOR MONEY OR PROPERTY RECEIVED UNDER VOID CONTRACT—LESSEES.**—While a corporation is liable to account for money or property received by it under a void contract, the rule does not apply to a lessee of the corporation whose lease is void, and who is found to have made nothing from the lease. *Visalia Gas etc. Co. v. Sims*, 105.
13. **INSOLVENCY—RIGHT OF RECEIVER TO SUE FOR STOCK SUBSCRIPTIONS.**—A receiver for an insolvent corporation, appointed at the instance of its

- creditors, is clothed with all their rights, and may sue to recover stock subscriptions although the corporation could not maintain such suit. *Cole v. Satsop R. R. Co.*, 858.
14. **INSOLVENCY—PREFERENCES.**—A creditor, not a director, who has no interest in an insolvent corporation other than that of its creditor, is not a trustee, and has the right to sue by attachment, and thus acquire a superior lien to any and all other creditors, although advised to attach by a director of the corporation. *La Grange Butter Tub Co. v. National Bank*, 558.
15. **INSOLVENCY—PREFERENCES IN EQUITY.**—A court of equity having acquired jurisdiction of an insolvent corporation for the purpose of administering its estate, is bound to respect legal rights and preferences already acquired, and to make distribution accordingly. *La Grange Butter Tub Co. v. National Bank*, 558.
16. **INSOLVENCY—ASSETS AS TRUST FUND.**—The assets of an insolvent corporation are trust funds for the benefit of all its creditors in so far as to prohibit the disposition of its assets toward the payment of debts due its officers, or by securing such debts by creating liens so as to thereby give them a preference over other creditors, or from the time when a court of equity acquires jurisdiction over it for the purpose of winding up its affairs and distributing the proceeds arising from a sale of the assets equitably among the creditors. *La Grange Butter Tub Co. v. National Bank*, 558.
17. **TRUST IN FAVOR OF CREDITORS.**—Equity regards the property of a corporation as a fund held in trust for its stockholders while it is solvent, and for the payment of its debts when it becomes insolvent, and if others than *bona fide* creditors possess themselves of it, then in case the corporation becomes insolvent, they hold it charged with a trust in favor of its creditors, and such trust a court of equity will enforce. *Atlas Nat. Bank v. More*, 274.
18. **FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATUTE—PENALTY.**—If a statute imposes a penalty on a foreign corporation for failure to file a copy of its charter and to appoint an agent the penalty so provided is exclusive of any other. *La France Fire Engine Co. v. Mt. Vernon*, 827.
19. **FOREIGN CORPORATIONS—FAILURE TO COMPLY WITH STATUTE—CONTRACTS WITH—ESTOPPEL.**—Under a statute failing to provide that contracts made by foreign corporations doing business within the state without complying with the provisions of such statute shall be void, but fixing a special penalty for such violation, a party contracting with such corporation is estopped from pleading its want of compliance with the statute. *La France Fire Engine Co. v. Mt. Vernon*, 827.
- See **ASSIGNMENT FOR THE BENEFIT OF CREDITORS; NEGOTIABLE INSTRUMENTS**, 1; **PARENT AND CHILD**, 1, 4; **TRADEMARKS**, 5, 6.

COSTS.

See **HOMESTEAD**, 9; **MARRIAGE AND DIVORCE**, 7.

COTENANCY.

1. **ADVERSE POSSESSION.**—A cotenant who, under color of title, enters into possession of the land held in common, claiming the whole to himself,

thereby acquires an adverse possession, and sets the statute of limitations in operation. *King v. Carmichael*, 303.

2. **CONVEYANCE BY ONE—ADVERSE POSSESSION.**—A cotenant who sells and conveys the whole of the land held in common and gives possession thereby creates in the grantee a title and possession adverse to the other cotenant or cotenants, and if such grantee continues to hold for the period of time prescribed by the statute of limitations he thereby acquires a good title as against them. *King v. Carmichael*, 303.
3. **PURCHASE OF TAX TITLE.**—A cotenant in possession cannot acquire title as against his cotenant by purchasing a tax title to the common property. *Thompson v. McCorkle*, 334.
4. **TENDER—WHEN UNNECESSARY.**—In an action by one cotenant to set aside a tax title to the common property acquired by another cotenant, no tender of taxes is necessary before bringing suit. *Thompson v. McCorkle*, 334.
5. **EJECTMENT AGAINST STRANGER.**—A tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover such possession in an action of ejectment brought against a stranger to the common title. *Allen v. Higgins*, 847.

See PARTITION.

COUNSEL'S ADDRESS.

See APPEAL, 4.

COUNTY COURT.

See INSOLVENCY.

COUPONS.

See BONDS.

COURTS.

THE GENERAL LANGUAGE OF THE OPINION IN A CASE MUST BE CONSTRUED with reference to the particular facts then before the court. *Chapman v. State*, 158.

See JURISDICTION.

CRIMINAL LAW.

THE ATTEMPT TO COMMIT A CRIME has been made when the opportunity occurs, and the intending perpetrator has done some act tending to accomplish his purpose, though he is baffled by an unexpected obstacle or condition. *People v. Gardner*, 741.

See EXTORTION; HOMICIDE; INCEST; INDECENCY; INTOXICATING LIQUORS; JUSTICES OF THE PEACE, 3; NEW TRIAL, 1, 2.

CUSTODY.

See PARENT AND CHILD, 1-4.

CUSTOM.

EVIDENCE TO PROVE.—PARTIES ARE PRESUMED to have dealt with reference to a general custom, and, in order to correctly interpret their intentions, evidence is admissible to put the court or jury in possession

of a knowledge of the custom in the light of which the parties transacted their business. *Bowman v. First Nat. Bank*, 870.

DAMAGES.

1. **DAMAGES PURELY SPECULATIVE** in character, and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable. *Hitchcock v. Supreme Tent*, 423.
2. **MEASURE OF—LOSS OF PROFITS.**—If one party breaks a contract which the other party has partly performed, and the violator then performs and completes the work himself from which he reaps the profits which the other party might have made, he cannot escape liability for damages if the other party can show the profits made while he was executing it, and the benefits received from its subsequent completion. The measure of damages is the profits and benefits remaining after the cost of doing the work has been deducted from the amount agreed to be paid for doing it. *Hitchcock v. Supreme Tent*, 423.
3. **MEASURE OF.—AN INSTRUCTION TO THE JURY** in an action to recover damages for the death of a railway employee, that they should assess the damages at whatever sum they should deem just and reasonable from all the evidence in the case, not exceeding the amount of the declaration, is not erroneous. The instruction could not have been understood by the jury to have authorized damages to be assessed by way of *solatium*, if there is no claim for such damages made in the declaration. *Chicago etc. R. R. Co. v. Kneirim*, 259.
4. **MASTER AND SERVANT — NEGLIGENCE—MEASURE OF DAMAGES—EARNINGS.**—In an action by a father to recover for personal injury to his minor son caused by negligence it is error to charge the jury, without evidence, that such son was likely to earn more than his present wages in the near future "by way of promotion." *Reese v. Hershey*, 795.
5. **STATUTES GIVING PUNITIVE, DOUBLE, OR TREBLE DAMAGES** against one cutting or otherwise converting to his own use timber growing on the land of another without his consent are confined to cases where some element of recklessness, wantonness, willfulness, or evil design enters into the act. Therefore, if the land is located in a wilderness, far from human habitation, and there is nothing to indicate that any one actually asserted ownership of any part of the country thereabout, and there is nothing to indicate willfulness, wantonness, or recklessness, actual damages only will be allowed. *McDonald v. Montana Wood Co.*, 616.
6. **PENALTY OR LIQUIDATED DAMAGES.**—TO DETERMINE WHETHER A SUM SPECIFIED IN A CONTRACT IS A PENALTY OR LIQUIDATED DAMAGES the court will consider the language used, the subject matter of the contract, and the intention of the parties. The fact that the parties used the words "liquidated damages" in their agreement does not always determine the question. The courts generally lean toward that construction which excludes the idea of liquidated damages, and permits the party to recover only the damages which he has actually sustained. *Hennessy v. Metzger*, 267.
7. **PENALTY OR LIQUIDATED DAMAGES.**—If a building contract names the day at which it is to be completed, and declares that the contractor for each day's delay beyond that time shall be charged with the sum of fifty dollars as liquidated damages, and it is difficult to determine what the

actual damages were, the sum named will be treated as liquidated damages, and the builder held answerable therefor. *Hennessey v. Metzger*, 267.

5. **PENALTY OR LIQUIDATED DAMAGES.**—Where, from the nature of a contract, the damages cannot be calculated with any degree of certainty, a stipulated sum will usually be held to be liquidated damages when so designated in the contract. *Hennessey v. Metzger*, 267.

See **BUILDING CONTRACTS**; **JUDGMENTS**, 12; **LANDLORD AND TENANT**, 4; **NEGLIGENCE**; **NUISANCE**, 4, 5; **SLANDER**, 3; **TRESPASS**, 2.

DEATH.

See **DAMAGES**, 3; **MECHANICS' LIENS**, 3.

DEBTOR AND CREDITOR.

FRAUDULENT CONVEYANCES—WHAT SUFFICIENT TO CREATE RELATION OF.—

The contingent liability of a surety is sufficient to create the relation of debtor and creditor within the meaning of the statute of frauds against the fraudulent alienation of property, and a note given for a pre-existing debt and renewed from time to time by the maker and surety continues the debt in force as originally made. *Reel v. Livingston*, 202.

See **ASSIGNMENT**, 4.

DECLARATIONS.

See **EVIDENCE**, 9; **WILLS**, 2.

DEDICATION.

THE DEDICATION TO PUBLIC USE OF A RIVER AND THE LAND COVERED THEREBY, except for the purposes of navigation, will not be presumed from the fact that the owner made and filed a plat subdividing his lands into lots and blocks, and on such plat represented the river as between parallel lines, and in the space between such lines wrote the name of the river. *Chicago v. Van Ingen*, 285.

DEEDS.

1. **DELIVERY IN ESCROW.**—Delivery of a deed by a grantor to his daughter for subsequent delivery, upon the happening of a certain event, to another of his daughters, named as grantee therein, is a good delivery. Upon the happening of the event named the grantee may compel the delivery of the deed to her. *Brown v. Stutson*, 462.
2. **A CONVEYANCE OF ALL THE LANDS, TENEMENTS, HEREDITAMENTS, APPURTENANCES OF EVERY DESCRIPTION** belonging to the grantors, or either of them, or in which they have, or either of them has, any interest, wherever such property, or any part thereof, may be situate, is not void for want of description, and transfers their title to any and all lands in which they have any interest. *McCulloch v. Price*, 637.
3. **CONVEYANCE.**—AN EXCEPTION FROM A CONVEYANCE OF ALL PROPERTY OF THE GRANTORS, OR EITHER OF THEM, EXEMPT FROM EXECUTION by the laws of the state wherein the conveyance is made, does not render it void for uncertainty. That is certain which may be made certain. *McCulloch v. Price*, 637.
4. **RECORD AS EVIDENCE OF EXISTENCE OF.**—An original record of a deed is not admissible in evidence to show the existence and execution

of the original deed when it is not shown that such original is not within the custody or control of the party offering such record copy. *Johnson v. State*, 172.

5. **QUITCLAIM—LIABILITY UNDER.**—A grantor conveying by deed of bargain and sale all his right, title, claim, and interest in and to a tract of land is not responsible for defects in the title beyond the covenants in his deed. *Reynolds v. Shaver*, 36.
6. **DEEDS OF ALL TITLE AND INTEREST—EFFECT OF COVENANT OF WARRANTY.**—If a deed purports in terms to convey only the right, title, and interest of the grantor to the land described, instead of conveying in terms the land itself, a general covenant of warranty is limited to that right or interest, and cannot be broken by the enforcement of a paramount title outstanding against the grantor at the time of the conveyance. *Reynolds v. Shaver*, 36.

DEFAULT.

See JUDGMENTS, 16.

DEFINITIONS.

- "Attestation." *Wickersham v. Johnson*, 118.
- "Body." *Walker v. State*, 186.
- "Copy." *Wickersham v. Johnson*, 118.
- "Due process of law." *State v. Billings*, 525.
- "Forthwith render judgment." *Sorenson v. Swensen*, 472.
- "Immediately." *Kentzler v. American etc. Accident Assn.*, 934.
- "Legal disability." *King v. Carmichael*, 303.
- "Night-time," What is. In the absence of statutory definition it is "night-time" so long as a man's face cannot be discerned; otherwise, without taking moonlight into consideration, it is daytime. Hence, an instruction fixing the end of night and the commencement of day at exactly one hour before sunrise is erroneous. *Klieforth v. State*, 875.
- "Open and gross lewdness." *State v. Juneau*, 877.

DESCENT.

ESTATES—RIGHT OF WIDOW TO SHARE IN PERSONAL PROPERTY OF HUSBAND.—Under the Michigan statute a widow takes a share of the personal property of her husband as distributee, and not as dowress, and is an heir as to such property. *Lyons v. Yerez*, 452.

See HUSBAND AND WIFE, 3.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOCKS.

See WATERS, 6; WHARVES.

DOWER.

1. **EFFECT OF DIVORCE.**—A decree of divorce from the bonds of matrimony bars the wife's claim of dower. *Wood v. Wood*, 42.
2. **TAX TITLES—EFFECT ON DOWER INTEREST.**—A wife's inchoate dower interest in land is not divested or affected by a tax sale of the land in the absence of a statute so providing. *Thompson v. McGorkle*, 334.

See CLOUD ON TITLE; LIMITATIONS OF ACTIONS, 3; TAXES, 1, 2;

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW; INSANE PERSONS.

DURESS.

1. **NEGOTIABLE INSTRUMENTS—DURESS AS A DEFENSE.**—The defense of duress is not, as a general rule, available in an action upon a promissory note given to prevent the prosecution of another person; but one exception to this rule is, that a wife may avoid her note made under duress of threats of criminal prosecution against her husband, as it is for that reason void. *City National Bank v. Kusworm*, 880.
2. **DISAFFIRMANCE OF CONTRACT WITHOUT RESTORATION OF CONSIDERATION.**—A wife may avoid her contract for duress without any reference to formal restoration if she has received no benefit, as there is nothing to restore. Hence, if, under duress of threats of criminal prosecution of her husband on the charge of forging notes deposited as collateral security for his own notes to a bank, a wife gives her note to the bank for the amount of her husband's notes, and the cashier of the bank delivers the husband's notes and the collaterals to a friend of the wife, who immediately hands them to her, with the request for her to deliver them to her husband, which she does, she may avoid her note, in an action upon it by the bank, upon the ground of duress, without restoring her husband's notes or the collaterals to the bank, as she has received no benefit. *City Nat. Bank v. Kusworm*, 880.

EIGHT HOUR LAW.

See STATUTES, 2, 3.

EJECTMENT.

1. **PLEADING—PRIMA FACIE CASE.**—Under a statute requiring the defendant in ejectment to plead the estate or license, under which he holds possession, an answer by way of general denial creates no issue under which evidence of his title is admissible, and, if the plaintiff pleads and proves any legal title to the premises, he thereby establishes a *prima facie* case. *Allen v. Higgins*, 847.
2. **EQUITABLE DEFENSE.**—A plea on equitable grounds may be interposed in an action of ejectment, provided the matter set up authorizes the defendant to enjoin the judgment, should one be recovered against him. The facts alleged in such plea must not, however, make such a defense as is available in the common-law action, or the court is justified in refusing to allow the plea to be filed, or in striking it out if filed. *Johnson v. Drew*, 172.

See COTENANCY; MUNICIPAL CORPORATIONS, 8; PATENTS, 1.

ELECTIONS.

See CORPORATIONS, 3-5; INTOXICATING LIQUORS; WITNESSES, 5-7.

ELECTRICITY.

See NEGLIGENCE, 4, 5.

ELEVATORS.

ELEVATORS—MASTER AND SERVANT—CARRIERS.—If a person using a whole building for his business permits, but does not require, his employees

to ride up and down on a freight elevator used therein, they are, while so riding in going to and from work, employees, and not passengers. The degree of care required of a master toward his servant is imposed upon the employer in such a case, and not that of common carrier of passengers. *McDonough v. Lanpher*, 541.

ENTIRETIES.

See HUSBAND AND WIFE, 6; PARTITION.

EQUITY.

1. JURY TRIAL.—THE VERDICT OF A JURY IS NOT CONCLUSIVE upon a court in an equity case by virtue of section 250 of the Code of Civil Procedure of Montana. It will not be presumed from any devious and uncertain language that the legislature undertook to prune away one of the most distinctive and important jurisdictional functions of the equity courts. *Kleinschmidt v. Greiser*, 652.
2. IF A LOSS MUST BE BORNE BY ONE OF TWO INNOCENT PERSONS, it shall be borne by him who occasioned it. *City Nat. Bank v. Kusworm*, 880.
3. EQUITY JURISDICTION.—THE TITLE TO AN OFFICE cannot be tried in equity. *State v. Van Beek*, 397.
4. MISTAKE.—FOR A MISTAKE OF LAW, pure and simple, there is generally no remedy, but relief may be afforded in equity if the surrounding circumstances are of such a nature that the adverse party is seeking to avail himself of the opportunities afforded by the mistake, and is attempting to enforce an unconscionable advantage without consideration, provided the other party is not blamable. *Lane v. Holmes*, 508.
5. MISTAKE.—EQUITABLE RELIEF CAN BE GRANTED if there is a mistake of fact, or a mistake of law and fact combined, especially if it does not result in injury to the opposite party. *Lane v. Holmes*, 508.
6. CONTEST OF WILL—RELEASE OF FUTURE POSSIBILITY—COVENANT NOT TO CONTEST, AND ITS ENFORCEMENT IN EQUITY.—If the subject matter of an existing covenant not to contest a will is in the mind of the contracting parties, and the covenant operates as a release of an expectancy as heir, a court of equity, upon the same principle that it upholds assignments of such expectancies, will sustain such covenant as a release by the presumptive heir of his contingent right to contest the will of his ancestor, and enforce the same, when fairly obtained, and for an adequate consideration. *In re Estate of Garcelon*, 134.

See CORPORATIONS, 15-17; JUDGMENTS, 18; MORTGAGES, 11; SPECIFIC PERFORMANCE.

ERROR, WRIT OF.

See CERTIORARI.

ESCROW.

See DEEDS, 1.

ESTATES.

AN HEIR MAY RELEASE TO THE ANCESTOR HIS EXPECTED SHARE in the ancestor's estate, and thereby estop himself from claiming as heir any

portion of such estate as might otherwise in the future vest in him as such heir. *In re Estate of Garcelon*, 134.

See DESCENT.

ESTOPPEL.

1. AN ESTOPPEL MUST BE MUTUAL. It must bind both parties, and one who is not bound by it cannot take advantage of it. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
 2. TO CONSTITUTE AN ESTOPPEL IN PARS some thing must be said or done by the person estopped. The independent act of another person, even though such other person is her husband, cannot create such an estoppel. *City Nat. Bank v. Kusworm*, 880.
- See CORPORATIONS, 11, 19; ESTATES; INSURANCE, 7; OFFICERS, 4.

EVICTIONS.

See LANDLORD AND TENANT, 2-4.

EVIDENCE.

1. EVIDENCE OBTAINED BY TORT.—Courts do not pause in the trial of a case to open up a collateral inquiry upon the question of whether a wrong has been committed in obtaining information possessed by a witness. *Cluett v. Rosenthal*, 446.
2. EVIDENCE OBTAINED BY TORT.—One who is in no way responsible for a tort by which information is obtained may introduce evidence of the facts so ascertained, although trespass has been committed by the witness in obtaining the information. *Cluett v. Rosenthal*, 446.
3. IMPROPERLY OBTAINED—CONTENTS OF ACCOUNT-BOOKS.—The fact that knowledge of the contents of account-books was obtained by a witness while they were in the hands of a sheriff under an authorized attachment does not render his testimony as to such contents incompetent if, at the time such knowledge was obtained, he was not acting for the person who seeks to introduce such evidence. *Cluett v. Rosenthal*, 446.
4. JUDICIAL NOTICE is taken of the fact that wine is an intoxicating liquor. *Wolf v. State*, 34.
5. JUDICIAL NOTICE is taken of the fact that a bank, when it makes a collection for a foreign correspondent, never, unless specially directed, remits the specie collected, but instead thereof always takes the specie to its own use, and sends therefor its draft or certificate of deposit. *Bowman v. First Nat. Bank*, 870.
6. JUDICIAL NOTICE—DESCRIPTION OF LANDS.—If lands are clearly and distinctly described by the complaint in a judicial proceeding by reference to the section, township, and range of the United States government survey, the court must take judicial notice of the county in which they are situated, without any evidence on that point. This matter must be determined by the court in the same manner as a legal proposition, and cannot be made an "issue" between the parties to be determined by the court in each case upon conflicting evidence presented in that case. *Rogers v. Cady*, 101.
7. LAW OF FOREIGN COUNTRY.—The foreign law, as to questions raised in the courts of this state, must be assumed, in the absence of any evidence tending to show what that law is, to be the same there as here. This rule

applies to England, as well as to sister states of the American union. *Wickersham v. Johnston*, 118.

9. **FOREIGN LAW MUST BE PLEADED AND PROVED.**—A foreign law is a matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of. Therefore it must be pleaded and proved. *Wickersham v. Johnston*, 118.
9. **DECLARATIONS OF DECEDENT.**—Statements made by a grantor that he had delivered a deed to his daughter to be delivered to another of his daughters, named as grantee therein, are admissible in evidence in an action, subsequent to the grantor's death, to compel a delivery of the deed to the grantee. *Brown v. Stulson*, 462.
10. **PAROL EVIDENCE IS ADMISSIBLE TO FILL OUT INCOMPLETE CONTRACT.** If a written order for the purchase of a chattel is incomplete, parol evidence is admissible to show what the whole agreement was that the article was ordered upon condition that it should be of a certain quality, and that performance on the buyer's part depended upon a compliance with the condition. *Aultman v. Clifford*, 478.
11. **JUDGMENT-ROLL OF ANOTHER STATE COURT—EVIDENCE.**—The judgment roll of another state court, or an authenticated copy of it, is evidence of all that it properly contains, including the judgment; and is, at least, *prima facie* evidence that the judgment was properly rendered and entered so as to have effect. *In re Ellis' Estate*, 514.
12. **BOOKS OF ACCOUNT** of a partnership which has executed a chattel mortgage on its goods in trust to secure an alleged indebtedness to the mortgagee and others are admissible in evidence as tending to show the *mala fides* of the transaction, if they tend to prove that part of the alleged indebtedness never in fact existed, and that the mortgagee was so familiar with the business of the mortgagors as to support the inference that he had examined the books. *Cluett v. Rosenthal*, 446.

See **CONTRACTS**, 11; **DEEDS**, 4; **EXTORTION**, 3; **JUDGMENTS**, 23; **NUISANCE**, 2, 3; **PATENTS**, 1.

EXCUSABLE NEGLECT.

See **JUDGMENTS**, 19.

EXECUTION.

1. **EXEMPTION.**—**WAGES EARNED IN ANOTHER STATE**, by the laws of which they are exempt from execution, are nevertheless subject to garnishment in this state. The exemption laws of another state cannot be pleaded or relied on as a defense by either the garnishee or the judgment debtor. *Lyon v. Callopy*, 396.
2. **THE INTEREST OF A BENEFICIARY UNDER A TRUST DEED IS NOT SUBJECT** to execution nor to garnishment when the estate is held by trustees with the power to take and keep possession thereof, and to apply the income and increase to the support, comfort, and education of such beneficiary, so far as may be required for such purposes. Her creditors can have no greater interest in the property than she possesses, and she cannot control the disposition of the trustees, nor require them to turn the property over to her. That result cannot be indirectly secured through the action of her creditors attempting to reach the property or its proceeds under process against her. *Meek v. Briggs*, 410.

See **DEEDS**, 3.

EXECUTORS AND ADMINISTRATORS.

1. **EXECUTORS AND ADMINISTRATORS—SALE OF CHoses IN ACTION.**—Under the statute choses in action are to be sold in the same manner as other personal property. *Wickersham v. Johnston*, 118.
2. **NEGOTIABLE INSTRUMENTS.**—The executors of the estate of a deceased person have no authority to sell and transfer notes belonging to the deceased. They are assets of the estate which can be sold only under and by order of the probate court. *Wickersham v. Johnston*, 118.
3. **JUDICIAL SALES—ADMINISTRATOR'S SALE WITHOUT APPRAISEMENT—COLLATERAL ATTACK.**—The sale of real estate by an executor or administrator without having it appraised is an irregularity for which the sale may be set aside in a direct proceeding for that purpose; but it is not on this account absolutely void in a collateral proceeding after confirmation by the probate court; nor is it void because appraisement was made before the entry of the order of sale. *Noland v. Barrett*, 572.
4. **JUDICIAL SALES.—ADMINISTRATOR'S SALES OF REAL ESTATE**, under orders of the probate court, in those states which require such sales to be reported to the court for its approval or rejection, are judicial sales. *Noland v. Barrett*, 572.
5. **JUDICIAL SALES.—ADJOURNMENT BY AN ADMINISTRATOR** of a sale of real estate to a time different from that fixed in the order of the probate court authorizing the sale does not render void the sale as afterward made, reported, and confirmed by such court, especially if the administrator has exercised a wise discretion in adjourning the sale for the purpose of preventing a sacrifice of the property. *Noland v. Barrett*, 572.
6. **JUDICIAL SALES—CONFIRMATION—CONCLUSIVENESS.**—The judgment of the probate court confirming an adjourned sale of real estate made by an administrator is final and conclusive until set aside in a direct proceeding, and cannot be collaterally attacked. *Noland v. Barrett*, 572.
7. **RIGHT OF EXECUTORS TO INVOKE COVENANT NOT TO CONTEST WILL—PRIVITY.**—The executors of the will of a deceased ancestor are in such privity with him that they have the right, as against an heir at law, who petitions to revoke the probate of the will, to invoke the benefit of the heir's covenant in a compromise agreement not to contest the will. *In re Estate of Garcelon*, 134.
8. **EVIDENCE—JUDICIAL RECORDS—PROOF OF PROBATE OF FOREIGN WILL, HOW MADE TO BE EFFECTUAL.**—A foreign judicial record of the probate of a will may be proved by a copy thereof, attested and certified as provided by statute, and is admissible in evidence, though, in the absence of proof of the foreign procedure being different from that of our own courts, it would be insufficient to support a right claimed under the will, unless an exemplified copy of the pleadings, petitions, or proceedings leading up to the order of admitting the will to probate and giving jurisdiction to make it is also introduced to make the record complete. *Wickersham v. Johnston*, 118.
9. **A JUDGMENT AGAINST AN ADMINISTRATOR OF A DECEASED PERSON** in one state is no evidence of debt in a subsequent action by the same person in another state against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. *Braithwaite v. Harvey*, 625.
10. **JUDGMENTS—PARTIES.**—AN ADMINISTRATOR UNDER A GRANT OF ADMINISTRATION IN ONE STATE is not privy in law nor in estate to an administration in another state. *Braithwaite v. Harvey*, 625.

11. JUDGMENT—PARTIES.—AN ADMINISTRATOR has no authority to act for or bind the estate outside of the jurisdiction of the state of his appointment, and therefore cannot be bound by a judgment entered against an administrator of the same estate in another state on the ground that he participated in the defense of the action in the other state. *Brathwaite v. Harvey*, 625.

See APPEAL, 2, 3.

EXEMPTION.

See DEEDS, 3; EXECUTION; FRAUDULENT CONVEYANCES, 4.

EXPECTANCIES.

See SALES, 1.

EXPERTS.

See WITNESSES, 8-10.

EXTORTION.

1. ATTEMPT TO COMMIT.—THIS CRIME DEPENDS ON THE MIND AND INTENT OF THE WRONGDOER, and not on the effect or result upon the person sought to be coerced. Hence, a person may be guilty of an attempt to commit it though he does not, as he intends, produce fear on the part of the person from whom he attempts to extort. *People v. Gardner*, 741.

2. WHERE ALL THE ELEMENTS OF THE CRIME OF AN ATTEMPT to commit extortion are present the person having the guilty intent cannot escape conviction on the ground that the person of whom he sought to extort was acting as a decoy, and therefore was not put in fear by the threats of the accused. *People v. Gardner*, 741.

3. CRIMINAL PROSECUTION—EVIDENCE.—Where, on the part of the prosecution, evidence is received that the accused was frequently in the company of a person whom he is charged with attempting to extort money from, and that he visited her at her house, and in saloons, etc., it is error to exclude evidence on the part of the defendant that in these acts he was under the direction of the officers of a society for the prevention of crime, and seeking to aid them, and bringing other persons to justice. *People v. Gardner*, 741.

FEEES.

See OFFICERS, 5.

FELLOW-SERVANTS.

See MASTER AND SERVANT, 7-12; RAILROADS, 11.

FILING.

See LIS PENDENS, 8.

FIXTURES.

See MORTGAGES, 7, 8; PERSONAL PROPERTY.

FORECLOSURE.

See JUDGMENTS, 14; MECHANIC'S LIEN, 8-10; MORTGAGES, 9-12.

FORFEITURE**See OFFICERS, 6.****FORGERY.****See BANKS, 3-6; NEGOTIABLE INSTRUMENTS, 3, 4.****FRAUD.**

DECEIT—JOINT PURCHASE OF LAND.—If one party induces another to join with him in the purchase of land, each to pay one-half of the purchase price, which the former falsely represents to be greater than it really is, and the latter gives the former one-half of such excessive price to be used in paying for his share, and the former pays for the land with a smaller amount, keeping the remainder himself, the deceit is actionable and the latter may recover the amount paid in excess of his share of the actual price, though the land is worth the price represented. *Bergeron v. Miles*, 911.

See FRAUDULENT CONVEYANCES; JUDGMENTS, 11-13, 18; NEGOTIABLE INSTRUMENTS; SPECIFIC PERFORMANCE, 12.

FRAUDULENT CONVEYANCES.

- 1. EVIDENCE—CONCEALMENT OF BUSINESS CARRIED ON IN SON'S NAME.**—In an action to subject land purchased in the name of the wife of an insolvent debtor, and paid for out of the proceeds of a business carried on by him in the name of his son, evidence that the wife had no separate estate, that the son had made no other contribution to the business than the use of his name, that he had paid no attention to the purchase of the real estate, which was made by his father, and not showing that the son had ever received any of the proceeds of the business, or that they have ever had an accounting with reference thereto, sustains findings that the debtor was the real owner of the business, and carried it on in the son's name for the purpose of fraudulently concealing it and its profits from his creditors, that the real estate was purchased with such profits, and conveyed to the wife, and accepted by her with like fraudulent intent, and that it should be conveyed by her to her husband's assignee for the benefit of creditors. *Ansorge v. Barth*, 928.
- 2. FRAUD AGAINST CREDITORS—CONCEALMENT OF PROPERTY UNDER COVER OF AGENCY.**—An insolvent debtor cannot accumulate property under cover of another's name, acting ostensibly as the latter's agent. If such a claim is made, it is always a question of fact whether the business actually belongs to such other person or to the ostensible agent and debtor, and whether the alleged agency is a mere scheme and device to conceal and keep the property used in, or gained by, it from his creditors. *Ansorge v. Barth*, 928.
- 3. CHATTEL MORTGAGE,** authorizing the mortgagee to take possession forthwith, and, in addition to the usual power of sale upon default, authorizing the mortgagee to sell at private sale or in the usual course of trade, does not vest any actual title in the mortgagee, and is not inconsistent with the rights of the mortgagors or their creditors who may acquire liens to redeem at any time. Hence such mortgage is not void as a general assignment with preferences. *Cluett v. Rosenthal*, 446.

4. **INSOLVENT DEBTOR—DISPOSITION OF EXEMPT PROPERTY.**—As against creditors, an insolvent debtor has a right to give his exempt property to his son as well as his time in carrying on and managing his son's business. *Ansorge v. Barth*, 928.
5. **SUFFICIENCY OF PLEADING TO SHOW.** — An allegation in a bill in equity that the payment by the husband of a mortgage note given for the purchase money of property conveyed to the wife was for the convenience of the husband, and for the purpose of defrauding, hindering, and delaying his just creditors, of which fact complainant was ignorant until recently before the filing of the bill, is an allegation of fraud in fact, and, coupled with a showing that the complainant, at the time of such settlement, sustained the relation of creditor to the husband, is sufficient of itself, if true, to maintain the bill and to subject the property in the hands of the wife to his debt, to the extent of the amount thus paid by the husband. *Reel v. Livingston*, 202.
6. **PURCHASE BY HUSBAND FOR WIFE—RIGHT OF HUSBAND'S CREDITORS TO ATTACK.**—The fact that property is purchased by the wife and partly paid for by the husband, and the deed taken in the name of the wife, coupled with an existing indebtedness of the husband, makes a *prima facie* case of fraud, and the creditor of the husband can subject the property in the hands of the wife or her legal representatives to his debt to the extent of the amount paid by the husband, unless the presumption of fraud is negatived by the financial condition of the husband, and the circumstances at the time, or other rebutting evidence. *Reel v. Livingston*, 202.

See DEBTOR AND CREDITOR; PARTNERSHIP, 7.

FUGITIVES.

See HOMESTEAD, 7.

FUTURE EARNINGS.

See ASSIGNMENT, 7.

GARNISHMENT.

See ASSIGNMENT, 3; ATTACHMENT.

GIFTS.

See LEGISLATURE.

GRANTS.

See BOUNDARIES; PUBLIC LANDS, 1.

GUARDIAN AND WARD.

See HOMESTEAD, 4.

HABEAS CORPUS.

1. **IRREGULARITIES—REVIEW OF JUDGMENT.**—After the court has acquired jurisdiction of the subject matter and of the person the subsequent proceedings, however erroneous, constitute no ground for the discharge of such person on a writ of *habeas corpus*. This writ cannot be used to review a judgment. *Smith v. Clausmeier*, 311.

- 2. JURISDICTION OF INFERIOR COURT—EVIDENCE TO IMPRACH.**—In a *habeas corpus* proceeding for release from custody under a commitment made by a justice of the peace evidence is admissible to show that the record of the court is untrue, and that the justice never obtained jurisdiction of the person of the petitioner. *Smith v. Clausmeier*, 311.
See CONTEMPT.

HARBOR COMMISSIONERS.

See STATES, 3, 4.

HOMESTEAD.

- 1. A HOMESTEAD EXEMPTION PROTECTS THE LAND**, and not any particular claim of title to it. *Perry v. Ross*, 66.
- 2. POSSESSION.**—One having possession of land is owner as to all the world except the holder of the legal title, and is entitled to the benefit of the Homestead Act. *Perry v. Ross*, 66.
- 3. ORDER SETTING APART HOMESTEAD TO WIDOW—ACTION TO ANNUL—CONCLUSIVENESS OF—FRAUD.**—If the complaint in an action to annul an order setting apart a homestead to the widow of a deceased husband, out of his estate, merely sets forth the falsity of the widow's statement made in her petition for the order, and again repeated in her testimony upon the hearing thereof, concerning the nature of the title to the land set apart, it does not state a cause of action, as the question of title was necessarily involved in the homestead proceeding, and was concluded thereby, the plaintiff having had notice of that proceeding, and not being prevented by fraud from appearing therein and contesting it. *Fealey v. Fealey*, 111.
- 4. JUDGMENT SETTING APART HOMESTEAD TO WIDOW—CONCLUSIVENESS OF, AS TO INCOMPETENT HEIR AND GENERAL GUARDIAN.**—It is the duty of a guardian to protect the rights of his ward. Hence, if a person dies leaving a widow and his mother as his only heirs at law, and the widow obtains an order setting apart a homestead to her out of the property of the decedent, the mother, previous to such order, having been adjudged an incompetent person for whom a general guardian was appointed, and the guardian having had knowledge of the homestead proceeding, the judgment in that proceeding is conclusive as to the mother in an action by her to annul the order. *Fealey v. Fealey*, 111.
- 5. RES JUDICATA—HOMESTEAD—COMMUNITY PROPERTY.**—In a proceeding to set apart a homestead to the widow of a decedent, the question as to whether the land set apart to her is or is not community property is necessarily put in issue, and is concluded by the judgment. *Fealey v. Fealey*, 111.
- 6. JUDGMENT—CONCLUSIVENESS AND EFFECT OF ORDER SETTING APART HOMESTEAD TO WIDOW OF DECEDENT.**—An order setting apart a homestead to the widow of a decedent, no homestead having been declared during the lifetime of the deceased, operates to vest in her a title to the land set apart out of the community property. It is in the nature of a judgment *in rem*, is conclusive upon all persons interested in the estate, if the court has jurisdiction to pronounce it, and can be successfully attacked in equity only upon the same grounds that a judgment *in personam* may be annulled. *Fealey v. Fealey*, 111.

7. **WIFE IS ENTITLED TO CLAIM** a homestead for herself and children out of the property of her husband after he has become a fugitive from justice, if she and her children continue to remain on and occupy the land. *Hollis v. State*, 28.
8. **HOMESTEAD CLAIMANT DOES NOT TRANSFER HIS RIGHT BY ASSIGNING HIS CONTRACT OF PURCHASE.**—If a husband in possession of land, after filing a declaration of homestead thereon, enters into a contract for its purchase from the owner, his assignment of the contract to secure borrowed purchase money does not create a lien upon the land, or convey to the lender either the contract right or the equitable title, although the declaration is filed before the purchase is made. *Perry v. Ross*, 66.
9. **LIABILITY FOR COSTS.**—Homesteads are not subject to sale under execution to satisfy a judgment for a fine or costs in a criminal prosecution. *Hollis v. State*, 28.

See MORTGAGES, 6.

HOMICIDE

1. **INDICTMENT FOR MURDER** need not state the dimensions of the incised wound which caused the death. *Walker v. State*, 186.
2. **INDICTMENT FOR MURDER** need not state upon what particular part of the human body the mortal wound was inflicted. *Walker v. State*, 186.
3. **INDICTMENT FOR MURDER** charging that a mortal wound was inflicted upon the "body" of the deceased is sufficient in law without stating upon what particular part of the body the wound was inflicted, and the word "body," as thus used, means the trunk of a human being as distinguished from the head and limbs; that part between the upper part of the thighs or hips, and the neck, excluding the arms. *Walker v. State*, 186.
4. **EVIDENCE—RES GESTÆ.**—An occurrence happening so short a time before a homicide as to be practically a part of the difficulty which ended with the killing is part of the *res gestas* and admissible in evidence as such. *Walker v. State*, 186.
5. **ARREST FOR MISDEMEANOR—HOMICIDE TO PREVENT ESCAPE.**—A peace-officer may arrest one committing a misdemeanor in his presence without a warrant, and, if necessary, orally summon as many persons as he deems necessary to aid him in making the arrest. In making the arrest, or in preventing an escape after the arrest, the officer or person assisting him in obedience to a summons, when resisted by the offender, is not bound to retreat, but may use such physical force as is apparently necessary, on the one hand to effect the arrest by overcoming the resistance he encounters, or, on the other hand, to subdue the efforts of the prisoner to escape, but he cannot in either case take the life of the accused, or even inflict upon him a great bodily harm, except to save his own life, or to prevent a like harm to himself. *Smith v. State*, 20.
6. **TO CONSTITUTE SELF-DEFENSE** it need not be made to appear that the killing was actually necessary; but to justify the killing, however, the accused, in acting upon the facts as they appear to him, must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life, or to prevent his receiving a great bodily injury. If there is no danger, and his belief of the existence thereof is imputable

to negligence, he is not excused, however honest his belief may be. *Smith v. State*, 20.

HUSBAND AND WIFE,

1. **MARRIED WOMAN'S NOTE — RIGHTS OF HUSBAND'S CREDITORS.**—A statute authorizing married women to acquire property by purchase free from their husbands' debts and to give notes therefor, but only when their husbands join in their execution, cannot be construed, as matter of law, as clothing the husband with the title to property purchased solely on the credit of the wife, so as to render it liable for his sole debts, when the purchase price of the property is secured by a note signed by the wife, her husband and her sureties and paid by the wife and her sureties alone. *Bollinger v. Gallagher*, 791.
2. **HUSBAND MAY ACT AS AGENT FOR HIS WIFE.**—It is entirely competent for a husband to act as his wife's agent in the transaction of his wife's separate business, and his doing so will not be allowed to prejudice the wife's rights. *Wood v. Armour*, 918.
3. **HUSBAND'S RIGHT IN WIFE'S ESTATE — ASSIGNABILITY — DESCENT — ADMINISTRATION.**—The husband, as an heir of his wife, has an interest in her estate, which he may sell or assign, subject to the claims of administration thereon, or dispose of by will. If not so disposed of it passes to his heirs subject to administration. *In re estate of Dobbel*, 123.
4. **ADVERSE POSSESSION UNDER TAX TITLE ACQUIRED BY MARRIED WOMAN.** After a married woman has acquired a tax title to land in the possession of her husband, and put it on record, her possession of the land through tenants is none the less adverse to the original owner by reason of the fact that her husband acts as her agent in the management of the property. *Wood v. Armour*, 918.
5. **MARRIED WOMEN — POWER TO CONTRACT — ATTORNEY'S SERVICES IN DIVORCE SUIT.**—A married woman may, by contract, make herself chargeable with the value of services rendered by an attorney upon her employment to secure a divorce from her husband, and the husband is not liable for such services unless made so by order of court. *Wolcott v. Patterson*, 456.
6. **TENANCY BY ENTIRETIES CONTINUES TO EXIST IN NEW YORK** when a conveyance has been made to a husband and wife, notwithstanding the separate property acts relating to the rights of married women. *Hiles v. Fisher*, 762.
7. **TENANCY BY ENTIRETIES.**—THE GREAT CHARACTERISTIC which distinguishes a tenancy by entireties from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the consent of the other, can dispose of any part of the estate, so as to affect the right of survivorship of the other. *Hiles v. Fisher*, 762.
8. **TENANCY BY ENTIRETIES — POWER AND CONTROL OF HUSBAND.** — At the common law a husband was held to be entitled to the full control, and to take all rents and profits of the land during the joint lives to the exclusion of the wife, and he had power to sell, mortgage, or lease for the same period, and this life interest was, according to the weight of authority, subject to the claims of his creditors. *Hiles v. Fisher*, 762.
9. **TENANCY BY ENTIRETIES — CONTROL OF HUSBAND.**—UNDER THE STATUTES RESPECTING THE SEPARATE PROPERTY OF MARRIED WOMEN by which a husband is deprived of his control over the property of his wife, and of his right to exclude her from its enjoyment, he has no greater inter-

est in, or control over, the property held by him and his wife as tenants by the entireties than she has, and therefore a mortgage made by him and a sale thereunder do not confer upon the purchaser any right to exclude the wife from the property, or from the rents or profits thereof. Such purchaser becomes in effect a tenant in common with the wife, subject to her paramount rights of survivorship. *Hiles v. Fisher*, 762.

See DESCENT; DURESS; ESTOPPEL, 2; FRAUDULENT CONVEYANCES, 1, 5, 6; HOMESTEAD, 7, 8; INSURANCE, 2-4; MARRIAGE AND DIVORCE; WITNESSES, 2, 3.

HYPOTHETICAL QUESTIONS.

See WITNESSES, 9.

IMPEACHMENT.

See JUDGMENTS, 12-14.

IMPROVEMENTS.

See LANDLORD AND TENANT, 1; SPECIFIC PERFORMANCE, 9, 10.

INCEST.

INCEST AND RAPE.—One accused of incest cannot escape conviction on the ground that the female upon whom the crime was committed did not consent thereto, or was of such an age that she was not at the time capable of giving her consent. That the act so committed also constitutes the crime of rape does not prevent it from constituting the crime of incest. *State v. Chambers*, 349.

INDECENCY.

1. **GROSS LEWDNESS, ACT OF, IS "OPEN," WHEN.**—Under a statute providing for the punishment of "open and gross lewdness," an act of gross lewdness is "open" though committed in a private place, and in the presence of but one person. Hence, such an act is "open" if committed in the presence of a child of tender years. *State v. Juneau*, 877.
2. **CRIMINAL LAW—"OPEN AND GROSS LEWDNESS"—EVIDENCE.**—A person may be convicted of the offense of "open and gross lewdness," upon the testimony of a child five years and five months old, who was less than five years old when the offense was committed, if there is some corroboration of its testimony. *State v. Juneau*, 877.

INDEMNITY.

See ATTORNEY AND CLIENT, 1.

INDEPENDENT CONTRACTORS.

See MASTER AND SERVANT, 1-3.

INDICTMENT.

See HOMICIDE, 1-3.

INDORSEMENT.

See BANKS, 3-6; CHECKS, 2-5.

INJUNCTIONS.

AN INJUNCTION WILL ISSUE TO RESTRAIN THE PIRACY OF PLAINTIFF'S TRADE-MARK, the distinguishing feature of which is used, in combination with others, to constitute a trademark or brand so similar in appearance as probably to deceive customers or patrons of plaintiff's trade or business, although it is not shown that any one has in fact been deceived, or that there has been intentional fraud. *Listman Mill Co. v. William Listman Milling Co.*, 907.

See MUNICIPAL CORPORATIONS, 2-4.

INNUENDO.

See SLANDER, 8-10.

INSANE PERSONS.

COMMITMENT OF INSANE—"DUE PROCESS OF LAW."—A valid proceeding to commit one as insane requires notice, and an opportunity to be heard before judgment. There must be a trial before a determination as to his sanity, and an opportunity to produce witnesses and evidence. Hence, a statute authorizing such a commitment, but not so framed as to compel a hearing before judgment, and which does not guarantee to the person charged an opportunity to be heard in defense, is invalid, because it conflicts with those provisions of the state and federal constitutions which forbid that any person shall be deprived of his life, liberty, or property without due process of law. *State v. Billings*, 525.

INSOLVENCY.

JURISDICTION.—A COUNTY COURT IN ILLINOIS, acting in insolvency proceedings, has jurisdiction to determine that a judgment rendered against the insolvent is not a lien upon his property or the proceeds thereof in the hands of his assignee, and to declare that such judgment, or some part of it, shall not be paid out of such proceeds. *Atlas Nat. Bank v. More*, 274.

See CORPORATIONS, 14-17; FRAUDULENT CONVEYANCES.

INSTRUCTIONS.

See APPEAL, 5; NEW TRIAL; TRIAL, 3.

INSURANCE.

1. **PAYMENT OF PREMIUM BY PROMISSORY NOTES—CONSIDERATION.**—Though one of the conditions of an insurance policy is that it "shall not be valid or binding until the first premium is paid," if it is silent as to the mode of payment, promissory notes received by the company, even in the absence of any express agreement, must be deemed to have been accepted in payment of the premium. The policy is binding, and is a valid consideration for the notes. *Union etc. Ins. Co. v. Taggart*, 474.
2. **POLICY PAYABLE TO WIFE—SEPARATE PROPERTY—GIFT.**—A husband may lawfully give to his wife a policy of insurance upon his life, and, when made payable to her by name, it is her separate property, although the application is made by the husband and the premiums are paid with money of the community. *In re Estate of Debbel*, 123.

2. **POLICY PAYABLE TO WIFE—DESCENT—HEIRSHIP.**—If a wife dies intestate before the death of her husband a policy of insurance in her name, being her separate property, is payable to her heirs at the time of her death, and her husband takes a one-third interest therein by virtue of his heirship to her separate property. *In re Estate of Dobbel*, 123.
4. **POLICY PAYABLE TO WIFE—DELAY OF ADMINISTRATION—HUSBAND'S RIGHTS.**—If the wife's estate at the time of her dying intestate consists of a policy of insurance on her husband's life, in her name, delay in the administration and distribution of her estate until after the death of her husband cannot affect his title, or that of his estate, to a one-third interest in the policy and its proceeds when paid to her estate. *In re Estate of Dobbel*, 123.
5. **FORFEITURE FOR CHANGE OF INTEREST.**—The taking of a partner by the assured and the transfer to him of an interest in the property avoids a policy if it contains a provision that if the property is sold, or transferred, or any change takes place in title or possession, the policy shall be void, though the policy also stipulates that the insurer will make good to the assured, his heirs, executors, administrators, and assigns all such immediate loss as shall result from the destruction of the premises from the perils insured against. *Germania etc. Ins. Co. v. Home Ins. Co.*, 749.
6. **LIFE BENEFIT ASSOCIATION—ACQUIRING RIGHT OF MEMBERSHIP WITHOUT FORMAL APPLICATION—ESTOPPEL.**—The relief department of a railroad company, in the nature of a mutual insurance association, organized for the benefit and protection of railroad employees, in case of sickness or death, and which places an employee's name upon the roll of its members at his solicitation, and deducts from his wages his assessment for benefits, on the basis of membership, with knowledge of the fact that no formal application had been made, and no physical examination had, as required by the by-laws, is estopped from disputing such employee's membership, upon the suit of the widow to recover a death benefit, notwithstanding a rule of the department, defining and limiting its liability in cases of regular and formal applications. *Burlington etc. Relief Department v. White*, 701.
7. **LIFE BENEFIT ASSOCIATION—MUTUAL INSURANCE COMPANY—EQUITABLE ESTOPPEL.**—The fact that the relief department of a railroad corporation, organized for the benefit and protection of railroad employees, is a mutual insurance company, does not relieve it from the operation of the rules of equitable estoppel. *Burlington etc. Relief Department v. White*, 701.
8. **LIFE BENEFIT ASSOCIATION—AUTHORITY OF SUBORDINATE OFFICERS TO WAIVE REQUIREMENTS.**—If a person desiring to become a member of the relief department of a railroad company, organized for the benefit and protection of railroad employees in case of sickness or death, and placed under the general management of a superintendent, does become such member, by the acts of the department, and in a manner different from that prescribed by its by-laws, and where all the steps taken toward that end are made with the knowledge of the superintendent, there is no question of the authority of subordinate employees to waive requirements, as their acts in such a case are the acts of the department. *Burlington etc. Relief Department v. White*, 701.

9. **LIFE BENEFIT ASSOCIATION—NO DISCHARGE OF ACCRUED LIABILITY BY REFUNDING ASSESSMENT.**—If a person is enrolled and becomes a member of a mutual railroad insurance association without the formal application or physical examination required by the by-laws the association, immediately after being notified of such person's disability, in case of subsequent sickness, cannot absolve itself from liability, and cancel the membership by refunding the member's contribution by "time check," which offer is made and refused just before the member's death, because the tender is not a legal one, and because liabilities have already accrued against the association from which it cannot discharge itself by refunding the assessment. *Burlington etc. Relief Department v. White*, 701.
10. **LIFE BENEFIT ASSOCIATION—BY-LAWS CANNOT PREVENT ACTION TO ENFORCE DEATH BENEFIT.**—The rule of a relief department of a railroad company, having the nature of a mutual insurance association, restricting themselves to remedies before tribunals created by the association, does not deprive a beneficiary of the right to maintain an action against the department to enforce the payment of a death benefit. *Burlington etc. Relief Department v. White*, 701.
11. **LIFE BENEFIT ASSOCIATION—WIDOW AS BENEFICIARY.**—The contract of a mutual railroad insurance association is ordinarily to pay the death benefit, where no beneficiary is named, to the wife of a member, if he has one. Hence, if one has become a member of such association without any written formal application, a court will hold the widow to be the beneficiary the same as it would if an application had been filed without designating any beneficiary. *Burlington etc. Relief Department v. White*, 701.
12. **BENEFIT SOCIETY—RIGHTS OF BENEFICIARY.**—The willingness of a mutual benefit society, after the death of the insured, to pay into court the money called for by the certificate, to be disposed of as the court may direct, cannot affect the rights of the beneficiary, as the society has no power by stipulation, or otherwise, to change or affect those rights. *McLaughlin v. McLaughlin*, 83.
13. **BENEFIT ASSOCIATIONS—POLICY PAYABLE TO HEIRS—RIGHTS OF WIDOW.**—If a member of a mutual benefit life insurance company dies intestate, and his insurance policy is made payable to his "heirs at law," his widow is entitled to share in the proceeds of the policy. *Lyon v. Yerez*, 452.
14. **BENEFIT SOCIETY—MODE OF CHANGING BENEFICIARY.**—The laws of a mutual benefit society prescribing a mode of changing the beneficiary must be followed. It cannot be made in any other manner. Hence, if that mode is confined to the surrender of the old, and the issuance of a new, benefit certificate, and the insured, having the power, fails to make official application for the change, and to pursue the proper course to effect it, no change can be made by his oral declarations of intention merely, or by the delivery of the certificate to the person whom he wishes to become his new beneficiary. *McLaughlin v. McLaughlin*, 83.
15. **ACCIDENT INSURANCE—MEANING OF WORD "IMMEDIATELY" IN POLICY.** The word "immediately" in a policy of accident insurance providing, as to accidents resulting in death, that notice shall be given and proof of death be made "immediately" after the accident occurs, that, unless such proof is furnished within six months thereafter, all claims shall be forfeited, and that the insurance shall not cover "disappearances,"

means such a convenient time as is reasonably requisite for giving the notice after the discovery of death, and that the proof is to be furnished within the six months specified after such discovery. *Kentler v. American etc. Accident Assn.*, 934.

INTEREST.

See BONDS, 3; JUDGMENTS, 22; NEGOTIABLE INSTRUMENTS, 2.

INTERVENTION.

See ATTACHMENT, 5.

INTOXICATING LIQUORS.

ELECTIONS—CONSTRUCTION OF STATUTE.—Under a statute making the giving away of intoxicating liquor on an election day a misdemeanor it is no defense that the giving away of such liquor on such day has no connection with or reference to the election then being held. *Wolf v. State*, 34.

See EVIDENCE, 4.

JUDGMENT-ROLL.

See EVIDENCE, 11.

JUDGMENTS.

1. **CONSTRUCTION OF—ERRONEOUS RECITAL.**—In construing a judgment which particularly describes lands by reference to the section, township, and range of the government survey, but which contains an erroneous recital as to the county in which they are situated, such recital must yield to the particular description. *Rogers v. Cady*, 101.
2. **DIRECT ATTACK—WANT OF NOTICE.**—An attack on a judgment by the judgment defendant, on the ground of want of actual notice, and fraud in its procurement, constitutes a direct attack. *Thompson v. McCorkle*, 334.
3. **JUDGMENTS OF INFERIOR COURTS—JURISDICTION—COLLATERAL ATTACK.** The judgment of an inferior tribunal upon a matter over which it has jurisdiction cannot be assailed collaterally for errors or irregularities subsequent to acquiring jurisdiction. The jurisdiction, to be complete so as to preclude collateral attack, must exist both as to subject matter and as to the parties, and the recital of jurisdictional facts in the record may be shown to be false by evidence *aliunde*. *Smith v. Clausmeier*, 311.
4. **RES JUDICATA.—IF A CAUSE OF ACTION IS SUBMITTED UPON DEMURRER** and adjudged insufficient by a judgment sustaining such demurrer on the merits the plaintiff and his privies and representatives are thereby barred from asserting the same facts in another action pertaining to the subject, as effectually as though such facts were found from the proofs or expressly admitted during the trial. *Kleinschmidt v. Bissel*, 604.
5. **RES JUDICATA.—A JUDGMENT AGAINST PLAINTIFF UPON DEMURRER** does not preclude him from subsequently asserting the same facts accompanied by additional allegations which complete the statement of a cause of action or of defense defectively stated in the former action or proceeding. Nor does the decision against the plaintiff on demurrer, on

- the ground that the remedy he seeks is not a proper one upon the facts charged, estop him from maintaining another and different action which those facts are adequate to support. *Kleinschmidt v. Binzel*, 604.
6. **RES JUDICATA—JUDGMENT ON THE MERITS.**—If the first suit was disposed of for defects in the pleadings or parties, or a misconception of the form of the proceeding, or a want of jurisdiction, or on any ground which did not go to the merits of the action, the judgment will prove no bar in another suit. *Kleinschmidt v. Binzel*, 604.
 7. **RES JUDICATA—BURDEN OF PROOF.**—IT MUST CLEARLY APPEAR from the record in a former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of *res judicata* is invoked as a bar was, in fact, necessarily adjudicated in the former action. If there be any uncertainty on this head in the record the whole subject matter of the action will be at large and open to new contentions, unless such uncertainty is removed by extrinsic evidence showing the precise point involved and determined. *Kleinschmidt v. Binzel*, 604.
 8. **RES JUDICATA—UNCERTAIN GROUNDS OF JUDGMENT.**—A JUDGMENT FOR THE DEFENDANT UPON A DEMURRER SPECIFYING that the complaint does not state facts sufficient to constitute a cause of action, and that there is a misjoinder of causes of action and of parties, merely means that the court finds some one of these causes of demurrer is good, and not that all are found good; and, in the absence of evidence that the judgment was upon the merits, it cannot constitute a bar to a subsequent action based upon the same facts. *Kleinschmidt v. Binzel*, 604.
 9. **A COLLUSIVE JUDGMENT IS OPEN TO ATTACK** whenever it may come into conflict with the rights or the interests of third persons, as fraud is not a thing which can stand even when robed in a judgment. *Atlas Nat. Bank v. More*, 274.
 10. **CONCLUSIVENESS.**—A judgment, so long as it stands, imports absolute verity as to every proposition of law and fact essential to its existence against all parties to it. *Shultz v. Shultz*, 320.
 11. **IF A JUDGMENT OR DECREE IS PROCURED THROUGH THE FRAUD OF EITHER OF THE PARTIES OR BY COLLUSION OF BOTH**, for the purpose of defrauding some third person, he may escape from the injury thus attempted by showing, even in a collateral proceeding, the fraud or collusion by which the judgment or decree was obtained. A judgment will not be upheld against the creditors of the judgment debtor if it is not founded on an actual debt or other legal liability due or enforceable at the time of its entry. A third party whose rights are affected may prove that there was no debt from the judgment debtor. *Atlas Nat. Bank v. More*, 274.
 12. **RIGHT TO RECOVER DAMAGES FOR OBTAINING.**—So long as a judgment obtained by fraud stands, a party thereto cannot maintain an action to recover damages for so obtaining it, as a recovery in such action would operate as an impeachment of the first judgment. *Shultz v. Shultz*, 320.
 13. **ACTION TO IMPEACH.**—A party to a judgment obtained by fraud can avail himself of that fraud only in a direct proceeding to vacate and set aside the judgment, and not in an action to recover damages on the ground that such judgment was fraudulently obtained. *Shultz v. Shultz*, 320.
 14. **IMPEACHMENT OF, FOR WANT OF JURISDICTION OF SUBJECT MATTER—ESTOPPEL.**—A judgment may always be impeached for want of juris-

diction of the subject matter appearing upon the face of the judgment. Hence, a judgment foreclosing a mortgage of lands particularly described by reference to the section, township, and range of the government survey, and which judgment further erroneously recites that such lands are situated in the county in which the foreclosure action was brought, does not estop the judgment debtor, when the judgment is sought to be enforced, from asserting in an injunction suit to restrain a sale that the mortgaged premises are situated in another county, and that the court was without jurisdiction to render such judgment. *Rogers v. Oady*, 101.

15. **OPENING AND SETTING ASIDE—APPEARANCE.**—A judgment regular on its face, without evidence of defense to it on the merits, cannot be opened or set aside on the ground that the appearance for the defendants was unauthorized, if that fact is not admitted or proved. *Swartz v. Morgan*, 786.
16. **JUDGMENTS ON VOID PROCESS.**—A judgment by default, based on the return of an officer made outside the state, and shown to be invalid under the laws of that state, is null and void. *Russell v. Grant*, 563.
17. **SETTING ASIDE—WANT OF JURISDICTION.**—A judgment cannot be set aside for want of jurisdiction of the person of the defendant when the findings upon which it is based show that it was rendered upon a valid record of service made in good faith. *Thompson v. McCorkle*, 334.
18. **EQUITY WILL SET ASIDE OR ANNUL FOR FRAUD, WHEN.**—It is only for fraud extrinsic or collateral to the matter in issue, and tried in an action, and not for a fraud in an action upon which the judgment was rendered, that a court of equity will set aside or annul a judgment for fraud. This rule is based upon the principle that there must be an end of litigation. *Fealey v. Fealey*, 111.
19. **VACATING FOR EXCUSABLE NEGLECT.**—The defendant is entitled to have a judgment vacated on motion on the ground that it was recovered against her through her excusable neglect, when it appears that she was vigilant from her first knowledge of the action, that she employed an attorney to defend it in the state wherein it was pending and of which she was a nonresident; that she forwarded to him a verified answer; and that he refused to file it because she did not accept a compromise negotiated by him and refused to open letters addressed to him and forwarded by her and her counsel from her place of residence. She cannot be regarded as inexcusably negligent, though she received a letter from the attorney stating that unless she accepted the terms of the compromise he would have nothing more to do with the case and would not file the answer, when she afterward wrote to him explaining that the compromise had never been authorized by her and requesting him to file the answer. She could not anticipate that he would refuse to open and read her letter. *Simpkins v. Simpkins*, 641.
20. **VACATING FOR UNAVOIDABLE CASUALTY.**—The serious sickness of an attorney's wife is an unavoidable casualty, excusing his nonattendance at court at the time his client's case is set for trial, and is ground for setting aside a judgment rendered at that time dismissing the action for want of prosecution, if the client has a meritorious cause of action, and has not been guilty of laches. *Leaming v. McMillan*, 26.
21. **ACTIONS UPON.**—A party who has recovered a joint judgment upon a joint and several claim may thereafter maintain an action upon the

judgment against either of the judgment debtors. *Olsen v. Veazie*, 855.

22. JUDGMENTS OF SISTER STATES—ACTIONS UPON—INTEREST.—In an action upon a judgment rendered in another state interest may be recovered thereon, although the judgment sued on does not of itself purport to bear interest, and there is no proof of a statute of such state authorizing the collection of interest on judgments rendered therein. *Olsen v. Veazie*, 855.

23. JUDGMENT OF ANOTHER STATE—HOW PROVED.—The judgment of a court of another state, if authenticated as provided by the act of Congress, must be received in evidence; but it is admissible here if authenticated according to the statute of this state, though such authentication may not be as full as that required by the act of Congress. *In re Ellis' Estate*, 514.

24. EFFECT OF DELAY IN ENFORCING.—One who does not attempt to enforce a judgment until more than three years have elapsed after its entry ought not to complain if, in the mean time, he has lost any rights by reason of his inaction. *Rogers v. Cady*, 101.

See EXECUTORS AND ADMINISTRATORS, 9-11; JUSTICES OF THE PEACE; MARRIAGE AND DIVORCE, 3-6; PARTNERSHIP, 9; PROCESS.

JUDICIAL NOTICE.

See EVIDENCE, 4-6.

JUDICIAL SALES.

1. VALIDITY OF AGREEMENT TO MAKE JOINT BID.—An agreement to make a joint bid at a judicial sale, although it may indirectly have the effect of keeping others from bidding, is not illegal unless it is intended to avoid competition. Hence, in the absence of any fraudulent or illegal intent or purpose, an agreement whereby one of several persons is authorized to bid for their common benefit on property about to be sold at sheriff's sale is not invalid. *Gulick v. Webb*, 720.

2. COMBINATION TO MAKE JOINT BID.—A combination between several persons holding liens against real property sold at sheriff's sale, no one of whom is able financially to bid individually at such sale, whereby one of such persons, by attorney, bids in the property for himself and the other lienholders, is not forbidden or contrary to law, and does not vitiate the sale. *Gulick v. Webb*, 720.

3. SALE TO COMBINED BIDDERS WILL BE UPHELD, WHEN.—A judicial sale to an association of persons formed for an honest purpose and with an honest intent, not with a view of stifling competition as to bids, but to enable them to compete where, without combining, they could not do so, will be upheld and completed. *Gulick v. Webb*, 720.

See EXECUTORS AND ADMINISTRATORS, 4.

JURISDICTION.

1. PRACTICE.—A COURT WILL RECOGNIZE WANT OF JURISDICTION even if no objection is made, for, if the court is without jurisdiction, it is powerless to act in the case. *State v. Van Beek*, 397.

2. JURISDICTION OF INFERIOR COURTS—CONCLUSIVENESS OF RECORD—EVIDENCE TO IMPEACH.—The record of a court of inferior or limited jurisdiction is given the same verity as that accorded the record of a court of general jurisdiction, only after it is shown that the inferior court

had jurisdiction of the subject matters and the parties tried before it. If jurisdiction is denied, no step can be taken until jurisdiction is shown. If the recitals in the record show jurisdiction and their correctness is admitted, that is sufficient; otherwise proof outside the record must be adduced to establish jurisdiction. *Smith v. Clausmeier*, 311.

See ADMIRALTY; INSOLVENCY; JUDGMENTS, 14, 17; JUSTICES OF THE PEACE.

JURORS.

See NEW TRIALS, 1, 2.

JUSTICES OF THE PEACE.

1. JUDGMENT.—The statute requiring a justice of the peace to “forthwith render judgment,” simply means that it shall be rendered within a reasonable time after the verdict is received, in view of the circumstances surrounding the particular case. *Sorenson v. Swensen*, 472.
2. JUDGMENT—REASONABLE TIME.—A judgment rendered by a justice of the peace on Monday, upon a verdict returned on the preceding Saturday, is within a reasonable time after verdict if he was then busy with other cases. *Sorenson v. Swensen*, 472.
3. JURISDICTION OF INFERIOR COURTS IN CRIMINAL CASES.—To give a justice of the peace jurisdiction over the person of one charged with a violation of criminal law the first step necessary is the filing of an affidavit naming the offense and the person charged with its commission, and without such affidavit there is no jurisdiction, and all the proceedings are void. An affidavit filed afterward comes too late, and cannot be made to relate back so as to confer jurisdiction at the time of the trial. *Smith v. Clausmeier*, 311.

See HABEAS CORPUS.

LACHES.

See CONTRACTS, 4; JUDGMENTS, 24; LIS PENDENS, 2.

LANDLORD AND TENANT.

1. IMPROVEMENTS.—A tenant cannot recover for improvements erected by him on the leased premises, without the consent and against the protest of the landlord. *Jones v. Hoard*, 17.
2. COVENANTS—RIGHTS OF TENANT—EVICTION.—Under a sublease of a cigar and news room in a hotel, with the appurtenances thereto, and the right of entrance to and from the hotel rooms, together with the entire cigar privilege of the hotel, the tenant is entitled to have the hotel kept open without reference to an implied covenant for quiet enjoyment. The abandonment of the lower floor of the hotel and the use of a portion only of the upper floors for sleeping-rooms in connection with a hotel across the street constitutes an eviction of such tenant. *Coulter v. Norton*, 458.
3. ASSIGNMENT OF LEASE—EVICTION—LIABILITY OF ASSIGNEE.—An assignee of a lease, to whom a subtenant attorns, is liable for the eviction of such tenant, accomplished by such assignee's acts. *Coulter v. Norton*, 458.
4. EVICTION.—MEASURE OF DAMAGES for the eviction of a tenant is the actual value of the unexpired term, less the rent reserved. *Coulter v. Norton*, 458.

See SURETYSHIP, 6, 7.

LEASE.

See ALTERATION OF INSTRUMENTS; CONTRACTS, 5; CORPORATIONS, 12; LANDLORD AND TENANT.

LEWDNESS.

See INDECENCY.

LEGISLATURE.

CONSTITUTIONAL LAW — GIFTS, PROHIBITION OF — PREVENTS LEGISLATURE FROM CREATING LIABILITY FOR NEGLIGENCE. — Under a constitutional provision forbidding the legislature from making any gift of public money, it has no power to create a liability against the state for any past act of negligence on the part of its officers. *Chapman v. State*, 158.

LIENS.

See ADMIRALTY; MECHANIC'S LIEN; PARTNERSHIP, 8; SURETYSHIP, 4.

LIMITATIONS OF ACTIONS.

1. **STATUTE OF LIMITATIONS DOES NOT RUN IN FAVOR OF A PURCHASER PENDENTE LITE.** He will not be regarded as holding adversely to the parties to a suit during the litigation. *Norris v. Ile*, 233.
2. **NOT UNTIL THE PURCHASER AT A FORECLOSURE SALE IS ENTITLED TO A DEED** can the mortgagor or his grantee assert an adverse possession. *Norris v. Ile*, 233.
3. **DOWER.**—The statute of limitations does not begin to run against the inchoate dower interest of the wife in lands until the death of her husband. *Thompson v. McCorkle*, 334.
4. **CAUSE OF ACTION FOR MISTAKE IN AN ABSTRACT WHEN ARISES.**—If a searcher of records employed to make a correct abstract of public records affecting the title to real property, through his negligence or mistake omits an instrument from such abstract, a cause of action against him is at once created, and the statute of limitations commences to run in his favor, and cannot be made to commence at a later day by proving that the mistake was not discovered until such later day. That the party for whom it was made, subsequently acting in reliance on its correctness, paid out money which he would not have paid had it been correct does not constitute any new cause of action. *Russell v. Polk County Abstract Co.*, 381.
5. **TORT, ACTION FOR, WHAT IS NOT.**—The fact that a person negligently performed a duty which he imposed upon himself by contract cannot entitle another contracting party to sustain an action of tort for such negligence, and therefore any action commenced to recover damages for the failure to perform such duty is an action upon a contract, and the statute of limitations applicable thereto is not that designating the time within which actions may be brought for torts, but is that declaring the time within which actions may be prosecuted upon contracts. *Russell v. Polk County Abstract Co.*, 381.
6. **DISABILITY—REMOVAL OF.**—The statute of limitations begins to run as to persons under legal disability, when the action accrues, but, if it has fully run before the disability expires, an action may be brought within the time limited by statute after the disability is removed. The phrase "legal disability" includes infancy. *King v. Carmichael*, 303.

7. **NEW PROMISE.**—A letter from an alleged debtor stating that if he does not hear from the creditor soon he will tender the amount due, and that whatever is due is ready whenever he can safely pay either to the person to whom the letter is directed, or to another person named therein, does not constitute a new promise sufficient to remove the bar of the statute of limitations, because it shows that there was a dispute as to what was due and to whom it was payable, and that the alleged debtor was not willing to pay until these two questions were settled. *Braithwaite v. Harvey*, 625.

See **ADVERSE POSSESSION**, 2, 3; **COTENANCY**, 1, 2; **MORTGAGES**, 4.

LIQUORS.

See **INTOXICATING LIQUORS**.

LIS PENDENS.

1. **TO THE EXISTENCE OF A VALID LIS PENDENS** three things are necessary: 1. The property must be of such a character as to be subject to the rule; 2. The court must have jurisdiction both of the person and of the *res*; 3. The *res* or property involved must be sufficiently described in the pleadings. *Norris v. Ile*, 233.
2. **LIS PENDENS BEGINS FROM THE SERVICE OF THE SUBPOENA** after the filing of the bill. A purchaser from the defendant while the suit is pending acquires his interest subject to such decree as may be rendered on the hearing. *Norris v. Ile*, 233.
3. **LIS PENDENS IS NO MORE THAN THE ADOPTION OF THE RULE IN REAL ACTIONS** at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action overreaches such alienation. *Norris v. Ile*, 233.
4. A purchaser of lands *pendente lite* takes his title therein subject to the final decree in the pending suit. *Norris v. Ile*, 233.
5. **THE DESCRIPTION OF THE PROPERTY IN THE PLEADINGS** is sufficient if any one reading them must be able to learn thereby what property is intended to be made the subject of the litigation. The legal maxim that that is certain which can be made certain applies to the question whether property is sufficiently described to create *lis pendens*. *Norris v. Ile*, 233.
6. **A PURCHASER PENDENTE LITE NEED NOT BE MADE A PARTY** to the suit nor otherwise noticed by the litigating parties. *Norris v. Ile*, 233.
7. **AMENDMENTS.**—If a bill originally so defective in its description of property, or, in the language of the prayer, as not to create *lis pendens*, is afterward cured by amendment in these particulars the *lis pendens* will commence at the time of filing the amendment, if the defendant has been served with process. *Norris v. Ile*, 233.
8. **THE FILING OF AN AMENDMENT** does not prevent *lis pendens* operating as under the original bill if such amendment does not set up any new equity, nor bring forward a new claim or distinct ground of relief. *Norris v. Ile*, 233.
9. **DELAY OR LAPSE OF TIME IN THE PROSECUTION OF A SUIT** will not create any estoppel against the right to enforce the rules of *lis pendens*, unless the complainant has been so negligent in its prosecution as to induce the belief that such prosecution had been abandoned. *Norris v. Ile*, 233.

See **LIMITATIONS OF ACTIONS**, 1.

LIVESTOCK.

See CARRIERS, 2; RAILROADS, 6, 7.

MACHINERY.

See MASTER AND SERVANT, 4-6.

MALICE.

See SLANDER, 6.

MANDAMUS.

MANDAMUS AGAINST MUNICIPAL CORPORATIONS.—Mandamus does not lie to compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in response to calls for bids to do city work. *Times Publishing Co. v. City of Everett*, 865.

MARRIAGE AND DIVORCE.

1. **DIVORCE ON AMENDED COMPLAINT.—REVIEW OF DECREE.**—If a plaintiff in an action for divorce, who has not acquired the statutory residence within the state before bringing suit, acquires such residence before filing an amended complaint setting up a distinct and separate cause for divorce, the amended complaint is equivalent to bringing a new action, and a decree of divorce rendered therein is regular so far as the question of residence is concerned, and cannot be set aside as erroneous on a bill of review. *Wood v. Wood*, 42.
2. **DIVORCE—PLACE OF TRIAL IN ACTION FOR—JURISDICTION.**—The trial of an action for divorce in a county other than that declared by statute to be the proper county for its trial does not go to the question of jurisdiction; and, in the absence of proof to the contrary, the law of a sister state in which the divorce was granted will be presumed to be the same as our own on this point. *In re Ellis' Estate*, 514.
3. **DIVORCE IN ANOTHER STATE—COLLATERAL ATTACK.**—If the judgment of a court of a sister state, granting a divorce on the complaint of a wife, is collaterally attacked in this state, its validity cannot be affected by the fact that she was induced to bring the action by persuasion, ill-treatment, and threats by the husband that unless she did bring it he would continue his ill-treatment. *In re Ellis' Estate*, 514.
4. **DIVORCE IN ANOTHER STATE—VOLUNTARY APPEARANCE—COLLATERAL ATTACK—JURISDICTION—JUDGMENT.**—If both parties voluntarily appear in an action for divorce in the court of another state, and submit to its jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that, when the action was brought and judgment rendered, neither of them was a resident of that state, but that both were residents of this state. *In re Ellis' Estate*, 514.
5. **DIVORCE IN ANOTHER STATE—COLLUSION—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.**—If residents of this state go to another state for a divorce, collusion between them as to the judgment to be rendered in the action does not affect the jurisdiction of the court of that state, or render its judgment void when collaterally attacked in this state. *In re Ellis' Estate*, 514.
6. **JUDGMENT FOR DIVORCE, VACATING.**—THE SUBSEQUENT marriage of the plaintiff does not impose any obstacle to the vacation of the decree of

divorce if it was procured through the excusable neglect of the defendant, where such motion is made promptly and within the time allowed by the statute. *Simpkins v. Simpkins*, 641.

7. MARRIED WOMEN—LIABILITY FOR EXPENSES OF DIVORCE PROCEEDING.

A statute providing that in divorce proceedings "the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit," including costs, and may award execution therefor or direct such sums "to be paid out of any property sequestered, or in the power of the court, or in the hands of a receiver," clearly indicates that such proceedings are to be maintained at the cost of the wife, unless the court shall relieve her therefrom by an order for expense money to be paid by her husband. *Wolcott v. Patterson*, 456.

8. DIVORCE—JUDGMENT WITHOUT AWARD OF ALIMONY—EFFECT OF.—A

judgment in a divorce suit settling the property rights of the parties, without an award of alimony, is, after the time of appeal has elapsed, as final as any other kind of a judgment, except so far as the power to modify it may be reserved to the court itself, or is given by statutory provisions. In such a case, in the absence of any such reservation of power, the court has no jurisdiction to make an order or supplemental decree granting alimony for the support of the wife and children. *Howell v. Howell*, 70.

9. DIVORCE—ALIMONY—MODIFICATION OF ORDER.—The statutory provi-

tion authorizing the court, from time to time, to modify its orders for the maintenance and support of the wife and children, contemplates that the right to alimony, as well as other property rights, shall have been presented and litigated in the action for divorce, and established by the judgment. If the right to alimony has been thus established, the amount may be changed by a modification of the order; otherwise there can be no modification, for there is nothing to modify. *Howell v. Howell*, 70.

10. ALIMONY—CONCLUSIVENESS OF DECREE.—A wife who, in her action for

divorce, fails to show by her complaint in what her husband's estate consists, or that it is within the jurisdiction of the court, cannot, after obtaining a decree of absolute divorce, with a large sum as alimony, have the decree vacated or amended on a bill of review, on the ground that the court failed to set apart to her one-third of her husband's estate as by statute provided. *Wood v. Wood*, 42.

11. ALIMONY IN GROSS.—An allowance of alimony in gross by consent of

the parties at the time the decree of divorce is rendered is not error. *Wood v. Wood*, 42.

See DOWER, 1.

MARRIED WOMEN.

See HUSBAND AND WIFE; TAXES, 2.

MARSHALING SECURITIES.

See MORTGAGES, 5, 6.

MASTER AND SERVANT.

1. INDEPENDENT CONTRACTOR'S LIABILITY FOR NEGLIGENCE.—The owner, and not the independent contractor, is liable for injury arising from negligent construction of the work if the owner retains and exercises the

right to direct the manner in which the details of the work shall be performed, but the contractor is liable if the power of the owner to direct the construction is confined to the result of the work without any control over the manner in which it is done. *First Presbyterian Congregation v. Smith*, 808.

2. **INDEPENDENT CONTRACTORS — NEGLIGENCE — LIABILITY AFTER ACCEPTANCE OF WORK.**—If an employee at the time of assuming possession of work from an independent contractor knew, or ought to have known, or from a careful examination could have known, that there was any defect in the work, he is responsible for any injury caused to a third person by defective construction. *First Presbyterian Congregation v. Smith*, 808.
3. **INDEPENDENT CONTRACTORS — LIABILITY FOR NEGLIGENCE AFTER ACCEPTANCE OF WORK.**—If an accident happens or injury is sustained after work done by an independent contractor has been accepted by the employer, and he has resumed possession, no recovery can be had by a third party against the contractor for negligence in the construction of the work. *First Presbyterian Congregation v. Smith*, 808.
4. **NEGLECT — MACHINERY.**—In an action by an employee against his master to recover for personal injury, the test of liability is not danger, but negligence, which can never be imputed from the employment of methods or machinery in general use in the business. *Reese v. Hershey*, 795.
5. **NEGLECT — MACHINERY.**—The use of machinery without a guard being the ordinary custom of the trade is not *prima facie* negligence on the part of the master in case of injury to the servant, and can only become negligence if the servant's inexperience is such that he ought to have been given special instructions concerning its use, and such instructions were not given. *Reese v. Hershey*, 795.
6. **NEGLECT — EVIDENCE.**—In an action by an employee against his master to recover for personal injury caused by the temporary removal of a safety guard of machinery, evidence is admissible to show that the same kind of machinery was used without guards in other factories where the employee had previously been employed, and that the guard in question was not in general use in the business. *Reese v. Hershey*, 795.
7. **DUTY OF SERVANT — LIABILITY OF MASTER.**—Fellow-servants owe to their master a diligent and watchful care over his business, and to each other a vigilance and caution for their own safety. The master is not liable for the consequences of their unfaithfulness to him unless he continues them in his employ with knowledge thereof, nor is he liable when he has violated no duty owing by him to them. *New Pittsburgh Coal etc Co. v. Peterson*, 327.
8. **FELLOW-SERVANTS.**—If one servant is injured by the negligence of another servant while they are directly co-operating with each other in a particular business in the same line of employment, or their duties bring them into habitual association so that they may exercise mutual influence upon each other, promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not answerable to the other servant suffering therefrom. *Chicago etc. R. R. Co. v. Kneirim*, 259.
9. **FELLOW-SERVANTS — VICE-PRINCIPAL.**—Employees serving a common master, engaged in the same common pursuit, and in accomplishing

the same common object, are fellow-servants. The mere fact that one of them has power to employ or discharge the others does not make him a vice-principal. *New Pittsburgh Coal etc. Co. v. Peterson*, 327.

10. VICE-PRINCIPAL.—A foreman may be, and ordinarily is, but a mere fellow-servant. The burden is upon an injured servant to show by allegations in his complaint that such foreman, whose negligence caused the injury, is a vice-principal and not a fellow-servant. *New Pittsburgh Coal etc. Co. v. Peterson*, 327.
11. VICE-PRINCIPALS.—The question as to whether an employee is a vice-principal or a fellow-servant must be determined by ascertaining whether the act performed or duty omitted is one, the doing of which is charged upon the master, and by him delegated to the servant. If it is the servant is a vice-principal, and the master is liable for injury resulting from such act or omission by such servant, provided the injured servant is free from negligence and has not assumed the hazard. *New Pittsburgh Coal etc. Co. v. Peterson*,
12. VICE-PRINCIPALS.—Whether an employee is a vice-principal or a fellow-servant does not depend upon his rank, but upon the fact as to whether the duty omitted or the act performed by him is one owing from the master to the injured servant, the discharge of which the master has conferred upon the negligent servant. *New Pittsburgh Coal etc. Co. v. Peterson*, 327.
13. VICE-PRINCIPALS—LIABILITY OF MASTER.—A servant injured by the negligence of another servant must show by his complaint that some duty of the master to him has been violated in order to hold the latter liable, and, if such duty is one, the discharge of which has been delegated by the master to a servant, not only the duty but the delegation of it, as well as its violation, must be alleged and shown by the complaint. *New Pittsburgh Coal etc. Co. v. Peterson*, 327.
14. THE DELEGATION OF A DUTY WHICH THE MASTER OWES TO HIS SERVANT OF EXERCISING REASONABLE AND ORDINARY CARE AND DILIGENCE in providing and keeping in repair reasonably safe machinery and appliances cannot relieve him from liability to a servant injured by the failure to exercise such care and diligence on the part of another servant to whom the duty has been delegated. *Chicago etc. R. R. Co. v. Kneirim*, 259.
15. ASSUMPTION OF RISK BY MINOR SERVANT.—In working in a dangerous place an adult servant must take ordinary care to observe and ascertain what dangers and defects are incident to his service, and if, by the use of such care, he ought to observe and comprehend such dangers or defects, he assumes all risk by continuing in the employment; but whether a minor servant is of sufficient age, intelligence, discretion, and judgment to bring him within the operation of this rule is a question of fact for the jury. *Luebke v. Berlin Machine Works*, 913.
16. MINOR SERVANT'S KNOWLEDGE OF DANGER, HOW DETERMINED.—A minor servant, in working in a dangerous place, must, as much as an adult, exercise the degree of intelligence, knowledge, and judgment actually possessed by him. The question, however, in such a case, is not what the minor, in fact, knows or comprehends as to the danger to which he is exposing himself, but what he, in view of his age, intelligence, discretion, and judgment, ought to know and understand. *Luebke v. Berlin Machine Works*, 913.

See DAMAGES, 3, 4; ELEVATORS; RAILROADS, 8-12.

MECHANIC'S LIEN.

1. **CONTRACT NOT TO FILE.**—A building contract under which the contractor agrees to keep the lot and building free from mechanics' liens, and any and all manner of charges, precludes the principal contractor, subcontractor, or any other person from filing and foreclosing any lien or charge against the building. *Fidelity etc. Life Assn. v. Jackson*, 789.
2. **SECRET AGREEMENT AGAINST.**—A materialman who furnishes material on the order of the record owner of land, without knowledge of a secret conveyance thereof to another, or of a verbal agreement between the vendor and purchaser that the former is to build a house on the land for the latter, and not to allow any mechanics' liens to be entered against it, is not bound by such conveyance or agreement, and is entitled to a mechanic's lien against the property. *McCollum v. Riale*, 816.
3. **ON THE DEATH OF THE OWNER OF PROPERTY** the right to file a mechanic's lien thereon terminates. *Tubridy v. Wright*, 776.
4. **DESTRUCTION OF BUILDING BEFORE COMPLETION.**—Materialmen and laborers are not entitled to a mechanic's lien on land for materials furnished or labor performed on a building thereon destroyed before its completion. *Goodman v. Baerlocher*, 893.
5. **FILING AND DOCKETING CLAIM.**—The right to a mechanic's lien is secured by delivering a claim therefor to the proper officer, within the time prescribed by statute, and leaving it with him to be filed. Such right is not prejudiced by the officer's failure to perform his duty, as docketing the claim is not a prerequisite to securing the lien. *Goodman v. Baerlocher*, 893.
6. **PARTIES.**—A mortgagee of land on which a building is erected subsequently to the mortgage is not bound or affected by proceedings to enforce a mechanic's lien against the building unless made a party. *Russell v. Grant*, 563.
7. **MORTGAGE—PRIORITY.**—The lien of a mortgage for the purchase price of land cannot be displaced or postponed by a mechanic's lien for material furnished for a building thereon which attaches simultaneously with the acquisition of title by the mortgagor and the execution of the mortgage. *Russell v. Grant*, 563.
8. **JUDGMENT OF FORECLOSURE—COLLATERAL ATTACK.**—A stranger whose interests are about to be prejudiced by the enforcement of a judgment foreclosing a mechanic's lien may show that it was rendered without jurisdiction. *Russell v. Grant*, 563.
9. **SUIT INTER PARTES.**—A proceeding to enforce a mechanic's lien is a suit *inter partes*, and not *in rem*. *Russell v. Grant*, 563.
10. **JUDGMENT OF FORECLOSURE—PARTIES.**—No valid judgment can be rendered establishing and foreclosing a mechanic's lien, unless the contractor who erected the building is made a party. *Russell v. Grant*, 563.

MERGER.

See MORTGAGES, 9; VENDOR AND PURCHASER, 7.

MINES.

- MINING CLAIMS—LOCATION OF.**—An association of not less than eight persons may locate a mining claim not exceeding one hundred and sixty acres. It is not necessary that a discovery should be made on each twenty acre tract, nor that each twenty acre tract should be marked off

on the surface of the ground, nor that work should be done, nor improvements made on each twenty acres. It is sufficient that one hundred dollars be expended in work or improvements on the whole claim within any one year. *McDonald v. Montana Wood Co.*, 616.

MISDEMEANOR.

See HOMICIDE, 5.

MISJOINDER.

See PLEADING.

MISTAKE.

See ADVERSE POSSESSION, 1, 2; BROKERS; EQUITY, 4, 5; MORTGAGES, 11.

MORTGAGES.

1. **TIMBER AS PART OF MORTGAGE SECURITY—LIABILITY OF PURCHASER.**—A purchaser from a mortgagor of timber standing on the mortgaged premises and forming a valuable part of the mortgaged security, with constructive notice of the mortgage at the time of his purchase, and with actual notice of its existence and of the insolvency of the mortgagor at the time he commences to cut such timber, is liable to the mortgagee for the value of the timber taken, in the event that upon foreclosure and sale of the mortgaged premises the proceeds are not sufficient to satisfy the mortgage debt. *Webber v. Ramsey*, 429.
2. **RECORD OF AS NOTICE OF LIEN ON TIMBER.**—A record of a mortgage of land on which is growing timber is constructive notice to the purchaser of the timber from the mortgagor of the lien of the mortgagee thereon. *Webber v. Ramsey*, 429.
3. **IMPAIRING SECURITY.**—A mortgagee has a right to the whole security to meet the amount of his mortgage encumbrance, and cannot be compelled to take a part. *Webber v. Ramsey*, 429.
4. **STATUTE OF LIMITATIONS.**—While the relation of mortgagor and mortgagee continues, neither party in possession can interpose the statute of limitations as a defense against the other, and neither the mortgagor nor his grantee can defeat the mortgagee's right of action by retaining possession and paying taxes. *Norris v. Ne*, 233.
5. **MARSHALING SECURITIES—PRIMARY FUND FOR PAYMENT OF MORTGAGE.** If the owner of mortgaged lands sells portions of them to third parties, retaining part of them himself, unless the purchaser took *cum onere*, the portion so remaining in the mortgagor becomes the primary fund for the payment of the mortgage, and the portions sold are liable in the inverse order of their alienation. *Merchants' Nat. Bank v. Stanton*, 491.
6. **MARSHALING SECURITIES—HOMESTEAD—MORTGAGES.**—If a man and wife execute a mortgage on their homestead and other lands, and afterward voluntarily convey, with covenants of warranty, a portion of the mortgaged premises, the land remaining, although the homestead, becomes the primary fund for the payment of the mortgage, as they have no equitable right to insist that their homestead shall be protected to the displacement of this countervailing equity of their grantee. *Merchants' Nat. Bank v. Stanton*, 491.

3. **FIXTURES — BUILDINGS ON ANOTHER'S LAND—MORTGAGES.**—If buildings are constructed on mortgaged land by one having no estate therein, and hence no interest in enhancing its value, by the permission or license of the mortgagor in possession, between whom there is an agreement that the buildings shall be the personal property of the one constructing them, the absence of a concurrent agreement on the part of the mortgagee, to the same effect, does not, of itself, make the buildings a part of the mortgage security. *Merchants' Nat. Bank v. Stanton*, 491.
 8. **FIXTURES ANNEXED SUBSEQUENT TO MORTGAGE — COMMON-LAW RULE INAPPLICABLE.**—The old rule that all fixtures annexed subsequently to the execution of a mortgage, whether by the mortgagor or by his tenant or licensee under a lease or license subsequent to the mortgage, became as to the mortgagee a part of the realty, is repudiated as inapplicable in states where a mortgage is a mere security, conveying neither title nor right to possession. The old rule was founded upon the common-law doctrine that a mortgage was a conveyance under which the mortgagee became the legal owner, and was entitled to immediate possession, the mortgagor in possession being considered strictly his tenant at will. *Merchants' Nat. Bank v. Stanton*, 491.
 9. **JUDGMENT—MERGER.**—Judgment foreclosing a mortgage without personal service on the mortgagor does not merge the cause of action if the full amount of the mortgage debt is not realized from the foreclosure sale. The mortgagee may maintain a personal action against the mortgagor to recover the amount yet remaining due. *Howard v. McNaught*, 837.
 10. **FORECLOSURE—RECOVERY OF BALANCE DUE—EVIDENCE.**—In an action to recover a balance due on the mortgage debt after foreclosure and sale of the mortgaged premises, evidence as to the value of the land is immaterial and inadmissible in the absence of an allegation of fraud by reason of which the mortgaged land has been sold for less than its value. *Howard v. McNaught*, 837.
 11. **MISTAKE IN FORECLOSING MORTGAGE—RESALE.**—If, by mistake in the computation of interest, mortgaged premises are sold at foreclosure sale for more than what is due, and the property is worth less than what is due, the mortgagee, having bid in the premises with the object of extinguishing the indebtedness, may be relieved in equity, and a resale ordered, without a tender on his part of the value of the use of the premises after the expiration of the time for redemption, that value being much less than the mistake made in the interest. *Lane v. Holmes*, 508.
 12. **JUDGMENT OF FORECLOSURE IS VOID, WHEN.**—Under the constitutional provision requiring an action for the foreclosure of a mortgage to be commenced in the county in which the mortgaged premises, or some part thereof, are situated, a judgment in a suit commenced in another county is without jurisdiction and void. *Rogers v. Cady*, 101.
 13. **RES JUDICATA.**—A DECREE IN A SUIT FORECLOSING A MORTGAGE, whether right or wrong, is binding on the parties to the suit and those purchasing from them, or either of them, during its pendency, and it cannot be attacked collaterally if the court had jurisdiction of the parties and of the subject matter. *Norris v. He*, 233.
- See** AGENCY, 2, 3; CHATTEL MORTGAGES; JUDGMENTS, 14; LIMITATIONS OF ACTIONS, 2; MECHANIC'S LIEN, 6, 7; PARTNERSHIP, 7; SUBROGATION, 1.

MUNICIPAL CORPORATIONS.

1. **PLEADING—CAUSE OF ACTION AGAINST CITY.**—A complaint in an action against a city to recover the balance of the purchase price of certain personal property based upon a note, and alleging a contract of purchase between the parties, that the note was given for part of the purchase price agreed upon, and issued under and by authority of the council of such city, that certain payments have been made by the issuance of warrants upon the treasury of such city, that there is now due and owing a specified sum, a claim for which has been duly presented to said city council and by it repudiated and payment refused, and that plaintiff is now the owner and holder of such note and claim, states a cause of action against the city. *La France Fire Engine Co. v. Mt. Vernon*, 827.
2. **INJUNCTION AGAINST AWARD OF CONTRACT.**—Agents of municipal corporations must maintain themselves within the law in the matter of awarding contracts for city work; and if through fraud, or manifest error, not within the discretion confided to them, they are proceeding to make a contract which illegally casts upon taxpayers a substantially larger burden of expense than is necessary, they may be enjoined to the extent of restricting their action within proper bounds. *Times Publishing Co. v. City of Everett*, 865.
3. **INJUNCTION AGAINST AWARD OF CONTRACT—JUDICIAL DISCRETION OF CONTRACTING AGENT.**—Under a statute requiring a contract for city work to be let to the lowest and best bidder some judicial discretion is vested in the city council in determining who is such bidder. The responsibility of the bidder, his experience, and his facilities for carrying out the contract may be looked into, and an honest determination that his bid, though the lowest, is not the best, must control; but, in every such case, to protect itself from interference by injunction at the suit of a taxpayer, such council must judicially find the facts, which in its judgment render the apparently lowest bid, not the best nor lowest in fact. *Times Publishing Co. v. City of Everett*, 865.
4. **INJUNCTION AGAINST AWARD OF CONTRACT—INTEREST SUFFICIENT TO MAINTAIN.**—The direct interest in the controversy possessed by a taxpayer, as one liable to be taxed, is sufficient to enable him to maintain, as plaintiff, an action to enjoin the letting of a contract for the doing of city work, no matter what his ulterior motives may be in prosecuting the suit. *Times Publishing Co. v. City of Everett*, 865.
5. **CONTROL OF STREETS—RIGHT TO CREATE NUISANCE.**—A city cannot create a nuisance in its streets, or devote them or any part of them to a purpose inconsistent with the rights of the public or abutting property owners. *Lockwood v. Wabash R. R. Co.*, 547.
6. **CONTROL OF STREETS—RIGHT TO CREATE NUISANCE.**—A city has no right to authorize the use of its streets for railroad purposes when such use necessarily destroys them as public ways, and deprives abutting owners of access to their property. *Lockwood v. Wabash R. R. Co.*, 547.
7. **CONTROL OF STREETS.**—Under a city charter vesting sole power in the "mayor and assembly" to grant franchises to street railroads, such power to be exercised only by ordinance, a permit from the mayor alone to construct and operate a railroad in the street is void, and confers no authority on a railroad company to occupy the street with tracks. *Lockwood v. Wabash R. R. Co.*, 547.

9. **PUBLIC USE IN STREETS—EJECTMENT.**—Public streets are in the possession of municipal authorities as trustees of the public who hold them for the use of the public as effectually as they do, or may, the public buildings of the municipality. Ejectment will not, therefore, lie at the suit of an abutting owner, to recover the possession of any part of the street from a railway company using it under a municipal franchise. *Montgomery v. Santa Ana etc. Ry. Co.*, 89.
9. **JURY TRIAL—RIGHT TO FOR MUNICIPAL OFFENSES.**—It is no objection to municipal ordinance creating an offense against the city government, and prescribing penalties therefor, that the trial thereunder is without a jury. *Hunt v. Jacksonville*, 214.
10. **ORDINANCE CREATING OFFENSE OUT OF ACT MADE PENAL BY STATE LAW.**—A municipality may, by ordinance, create an offense against municipal law out of the same act already constituting an offense against state law. The two are then distinct offenses, punishable by both the municipality and by the state, and a conviction or acquittal by the one is no bar to prosecution and punishment by the other. *Hunt v. Jacksonville*, 214.

See ATTACHMENTS, 3-5; CORPORATIONS, 10; MANDAMUS.

MURDER.

See HOMICIDE.

NAMES.

See TRADEMARK.

NAVIGATION.

See DEDICATION.

NEGLIGENCE.

1. **SUFFICIENCY OF COMPLAINT.**—If any negligent act of one party is charged which, in the conditions existing, results in loss to another, the latter is entitled to recover, although the declaration may charge other acts as negligent which are either not proven or which may not in law be negligent. *Smith v. Michigan Cent. R. R. Co.*, 440.
2. **CONTRIBUTORY OF ONE PERSON, WHEN IMPUTED TO ANOTHER.**—A person who voluntarily takes passage in a vehicle, driven and managed by another, assumes the risk of the care and skill of the latter, and if an injury results to which the negligence of the latter contributed, cannot recover therefor. *Whittaker v. Helena*, 621.
3. **WHEN IMPUTED.**—The negligence of the driver of a private conveyance in driving over an obstruction in the street is imputable to a person of the age of discretion who voluntarily rides with him, and prevents his recovery for the injuries received. *Mullen v. City of Owosso*, 436.
4. **CONTRIBUTORY—WHEN QUESTION FOR JURY.**—Whether one killed by a live electric wire which had become grounded during a storm, and which he undertook to move out of the way, was guilty of contributory negligence in so doing, is for the jury to decide, from a consideration of the object he had in view, his knowledge or ignorance of all the elements of danger connected therewith, and previous warnings to him of the danger of handling grounded wires. *Tamarkana Gas etc. Co. v. Orr*, 30.

5. **LIVE ELECTRIC WIRES IN STREET—DAMAGES.**—Evidence that an electric light company knew at night that its wires were grounded, that it nevertheless kept its power up, and that the next day a pedestrian was killed by coming in contact with a live wire in the street, is sufficient to establish gross negligence, and justify a verdict and judgment for punitive as well as actual damages. *Texarkana Gas etc. Co. v. Orr*, 30.
- See **APPEAL**, 3; **BAILMENT**, 3, 4; **CARRIERS**, 2; **LEGISLATURE**; **MASTER AND SERVANT**; **STATES**, 1; **SURETYSHIP**, 7; **WHAVER**, 2, 3.

NEGOTIABLE INSTRUMENTS.

1. **CORPORATION—NOTE GIVEN WITHOUT CONSIDERATION.**—A note executed by a corporation, the real purpose of which is to secure a debt due to the payee from a business partnership, but which purports to be given in consideration of a purchase of a lot of notes then known to be substantially worthless, and to represent the accumulated losses of such firm, and when the vote authorizing the giving of the note was cast by directors of the corporation, all of whom were personally interested in the giving of such note, because it would relieve them from liability by imposing such liability on the corporation, and the securities for the purchase of which the note was given were never turned over to the corporation, is a mere sham, and, if the corporation is subsequently declared an insolvent debtor, its assets should not be applied to the payment of a judgment based upon such note. *Atlas Nat. Bank v. More*, 274.
2. **INCREASE OF INTEREST.**—A provision in a note for an increased rate of interest, if payments are not made when due, is not a penalty, but a contract. By accepting the original rate the payee waives his right to collect a greater rate for the time past, but not to demand the increased rate for the future. As to future interest the note is an executory written contract alterable only by a contract in writing or by an executed oral agreement, as provided by statute. *Thompson v. Gorner*, 81.
3. **BILLS OF EXCHANGE—FICTITIOUS PARTIES.**—The fact that a check or bill of exchange is made payable to a person who does not own it, but is merely an officer or agent of the corporation or person entitled to its proceeds, does not constitute it a bill or check payable to a fictitious person, nor render it any the less forgery to indorse the name of the person designated therein as payee without authority so to do. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
4. **BANKING—FORGED CHECKS.**—THE DRAWER OF A BILL OF EXCHANGE OR OF A BANK CHECK is conclusively presumed to know the signature of the drawer, and if he accepts or pays in the usual course of business a bill or check whereon the signature of the drawer is a forgery, he and the person to whom payment is made are both estopped to afterward deny the genuineness of such signature. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
5. **PLEADING FRAUD IN INCEPTION OF.**—An answer in an action by the indorsee of a negotiable instrument which avers fraud in its inception, but does not allege that the plaintiff participated in or had notice of the fraud at the time of the indorsement to him, is sufficient. The plaintiff, if such fraud is proved, must assume the burden of establishing that he was the indorsee for value before maturity and

without notice of the fraud which is sought to be asserted as a defense. *Thamling v. Duffey*, 658.

See BONDS; COMPOUNDING FELONY; DURESS, 1; EXECUTORS AND ADMINISTRATORS, 2; HUSBAND AND WIFE, 1.

NEW PROMISE.

See LIMITATIONS OF ACTIONS, 7.

NEW TRIAL

1. **CRIMINAL CASES—DISQUALIFICATION OF JURORS.**—A person accused of crime is not entitled to a new trial on the ground that a juror had formed and expressed an opinion before he was selected, if he was accepted as such juror without examination by the accused. *Smith v. State*, 20.
2. **AFFIDAVITS OF JURORS** are not admissible to show that the jury received evidence after they retired to consider their verdict, under a statute providing that a juror cannot be examined to establish any ground for a new trial, except that the verdict was made by lot. *Smith v. State*, 20.
3. **JURY TRIAL.—AN INSTRUCTION, THOUGH ERRONEOUS,** will not require the granting of a new trial, if it appears from the evidence that no other verdict could have been properly returned by the jury under instructions entirely correct. *Chicago etc. R. R. Co. v. Kneirim*, 259.

NIGHT-TIME.

See DEFINITIONS.

NOTARIES PUBLIC.

See SURETYSHIP, 1-3.

NOTICE.

See ADVERSE POSSESSION, 3; ASSIGNMENT, 2; MORTGAGE, 2.

NUISANCE.

1. **NUISANCE—POLLUTION OF WELL—SCIENTER.**—To recover damages for the pollution of a well it is enough that it was the natural and probable consequence of the defendant's acts. It is not necessary that the fact of contamination was known to the defendant. *Beatrice Gas Co. v. Thomas*, 711.
2. **NUISANCE—POLLUTION OF WELL—EVIDENCE.**—In an action to recover damages for the pollution of a well, evidence that the injury can be avoided by the digging of a new well is admissible in mitigation of damages, but is no defense to the action. *Beatrice Gas Co. v. Thomas*, 711.
3. **NUISANCE—POLLUTION OF WELL—EVIDENCE.**—After the plaintiff, in an action to recover damages for the pollution of his well, has introduced evidence that other wells in the neighborhood were likewise affected, defendant should be allowed to show that other wells a great distance away were similarly polluted, as this would tend to show that the cause in both cases was a general one, affecting the whole region, and not the act of defendant. Such evidence, however, should be confined within reasonable limits to avoid the danger of introducing collateral issues into the trial. *Beatrice Gas Co. v. Thomas*, 711.

4. **CONTINUING NUISANCE—POLLUTION OF WELL—MEASURE OF DAMAGES.**—the pollution of a well causes permanent and irremediable damage to plaintiff's land he is entitled in one action to all damages, present or prospective; but if temporary in character, and capable of being avoided in the future, he can recover damages only up to the commencement of the action, as the contamination is then in the nature of a continuing nuisance. *Beatrice Gas Co. v. Thomas*, 711.
5. **POLLUTION OF WELL—DAMAGES.**—One who collects injurious or offensive matter upon his premises, which, by percolation, transmission through subterranean streams, or otherwise, pollutes his neighbor's well, is liable for the damages sustained. *Beatrice Gas Co. v. Thomas*, 711.

See MUNICIPAL CORPORATIONS, 5, 6; WATERS, 12.

OBSTRUCTIONS.

See WATERS, 9.

OFFICERS.

1. **PUBLIC OFFICE.**—THE TITLE TO A PUBLIC OFFICE may be tried in proceedings against a person claiming to be entitled to such office, though he has not yet taken possession of it, if the statute declares that, when several persons claim to be entitled to the same office or franchise, a petition may be filed against all, or any portion of them, in order to try their respective rights thereto. *State v. Van Beek*, 397.
2. **PUBLIC OFFICE.**—AN ALIEN IS NOT ENTITLED to hold a public office, though there is no constitutional or statutory provision expressly excluding him from such right. *State v. Van Beek*, 397.
3. **PUBLIC OFFICE.**—AN ALIEN ELECTED TO A PUBLIC OFFICE is, on subsequently, and before the time when he is required to qualify for the office, becoming a naturalized citizen, entitled to hold such office and discharge the duties thereof, if there is no constitutional or statutory provision expressly requiring him to be qualified therefor at the time of his election. *State v. Van Beek*, 397.
4. **ESTOPPEL TO DENY OFFICIAL CAPACITY.**—If, under the provisions of law, the office of county attorney is the same as that of prosecuting attorney, one who, though elected as county attorney, assumes the duties of the office of prosecuting attorney, and collects delinquent taxes as such officer, is estopped to deny that he is filling that office in an action against him by the county to recover for taxes so collected by him. *County of Spokane v. Allen*, 830.
5. **ATTORNEY FEES FOR COLLECTING TAXES—EXTRA COMPENSATION.**—Attorney fees paid by delinquent taxpayers upon tax collections made by a county attorney whose duty it is to collect such taxes and whose salary is fixed by law cannot be retained by him as compensation for duties extrinsic to his office. The retention of such fees by him is extra compensation, and contrary to a constitutional prohibition upon the increase of the compensation of a public officer during his term of office. *County of Spokane v. Allen*, 830.
6. **PUBLIC OFFICE.**—THE RIGHT TO A PUBLIC OFFICE IS NOT FORFEITED by the failure to qualify at the time designated in the statute, if such qualification was prevented by an injunction or other proceeding by which the right or power to qualify was temporarily suspended. *State v. Van Beek*, 397.

- 7. OFFICIAL BONDS — LIABILITY OF SURETIES.** — Sureties on an official bond are presumed to take notice of the fact that changes may be made concerning the duties of their principal, and when these changes are made in matters of minor importance, which as a whole do not substantially increase their liabilities, they are not exonerated nor released by such changes. *County of Spokane v. Allen*, 830.
- 8. OFFICIAL BONDS — LIABILITY OF SURETIES.** — If an entirely new and distinct class of duties, not germane to the office, are imposed upon a public officer, his sureties are not liable to answer for the faithful performance of the added responsibilities. *County of Spokane v. Allen*, 830.
- 9. OFFICIAL BONDS — LIABILITY OF SURETIES FOR ADDITIONAL DUTIES IMPOSED ON OFFICER.** — If, after a county attorney has been elected, given an official bond, and has assumed the duties of the office, a statute is enacted imposing upon him the new and additional duties of collecting and accounting for delinquent taxes, such duties are not germane to his original office, and the sureties on his official bond are not liable for the nonperformance by him of the new and additional duties thus imposed. *County of Spokane v. Allen*, 830.
- See EQUITY, 3; LEGISLATURE; STATES, 1-4; SURETYSHIP, 1-3; TRESPASS, 1.

ORDINANCES.

See MUNICIPAL CORPORATIONS, 10.

PARENT AND CHILD.

- 1. RIGHT TO CUSTODY.** — A charitable corporation having no legal right to the custody of a minor child cannot retain such custody as against its parents, no matter whether they are proper custodians or not. *Lovell v. House of the Good Shepherd*, 839.
- 2. RIGHT OF PARENT TO CUSTODY.** — Before parents can be deprived of the custody or comfort of their minor child a case must be made which is sufficiently extravagant, singular, and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing. *Lovell v. House of the Good Shepherd*, 839.
- 3. RIGHT OF PARENT TO CUSTODY.** — The fact that the mother of a minor child is a passionate, coarse, vulgar, and pugnacious woman, and that the father is addicted to the excessive use of intoxicants, and has other debasing habits, is not sufficient to deprive them of the custody of the child. *Lovell v. House of the Good Shepherd*, 839.
- 4. RIGHT TO CUSTODY — ESTOPPEL.** — If a charitable corporation has no legal right to the custody of children placed in its charge a mother who has placed her minor child in charge of such institution, under a promise that the child should remain there until eighteen years of age, is not estopped to assert her right to the custody and control of the child at any time before it arrives at such age. *Lovell v. House of the Good Shepherd*, 839.

See DAMAGES, 4.

PAROL.

See EVIDENCE, 10.

PARTIES.

See SPECIFIC PERFORMANCE, 5.

PARTITION.

STATES BY ENTIRETY ARE DISSOLVED BY DIVORCE; they then become tenancies in common, and may be partitioned. *Russell v. Russell*, 581.

PARTNERSHIP.

1. **WHAT CONSTITUTES.**—Parties having a community of interest in the capital employed in, and in the profits derived from, a business are partners as to third persons. *Webster v. Clark*, 217.
2. **AGREEMENT FOR—WHAT CONSTITUTES.**—A written agreement disclosing a transaction in which the parties thereto have a community of interest in the capital employed, as well as a community of interest in the profits arising therefrom, constitutes them partners as to third persons, and liable as such, notwithstanding the fact that the transaction is sought to be concealed under the guise of a lease. *Webster v. Clark*, 217.
3. **WHAT CONSTITUTES.**—A trade arrangement entered into upon such a basis that the parties thereto have a community of interest in the capital stock engaged therein, and a community of interest in the profits resulting therefrom, constitutes a partnership and the parties thereto partners. *Webster v. Clark*, 217.
4. **AGREEMENT FOR.**—If an agreement under which a business arrangement is carried on, and which is claimed to be a partnership, is in writing, free from ambiguity or doubt, its legal effect must be determined, as a matter of law, and the intention of the parties gathered therefrom; but, if the language employed leaves the true meaning in doubt, the construction put upon the contract by the parties thereto may be looked to in determining its legal effect. *Webster v. Clark*, 217.
5. **LIABILITY OF ONE HELD OUT AS PARTNER.**—One who is not actually a partner, and who has no interest in a partnership, cannot by reason of having held himself out to the world as a partner be held liable as such on a contract made by the partnership with one who has no knowledge of the holding out. *Webster v. Clark*, 217.
6. **LIABILITY OF ONE HELD OUT AS PARTNER.**—Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists he is never to be charged as a partner, unless, by contract and with intent, he has formed a relation in which the elements of a partnership are to be found. *Webster v. Clark*, 217.
7. **A MORTGAGE MADE BY THE MEMBERS OF A PARTNERSHIP** on the firm property to secure the individual debt of one of its members is not fraudulent as against creditors of the firm, and they are not entitled to have it vacated because its enforcement will prevent the firm property from being applied to the satisfaction of the firm obligations. *Smith v. Smith*, 359.
8. **THE RIGHT OF FIRM CREDITORS TO PAYMENT OUT OF FIRM ASSETS.**—The creditors of a firm have no lien on, or equity in, the partnership property. Therefore, with the consent of the partners, it may be applied to the payment of their individual debts, though the firm is then insolvent. The partnership creditors are not entitled to set aside such payment as fraudulent as against them. *Smith v. Smith*, 359.
9. **JUDGMENTS AGAINST PARTNERS—DESIGNATION OF PARTIES.**—A judgment describing the parties against whom it is rendered by their part-

nership name is valid, although in the action in which the judgment is rendered they are sued as individuals composing a partnership and as joint debtors, and designated by their individual names in the pleadings, including the caption to the judgment entry itself. *Olsen v. Veazie*, 855.

See INSURANCE, 5; TRADEMARKS, 6.

PATENTS.

1. **AS EVIDENCE.**—In an action of ejectment based upon a government patent to land regular upon its face, the patent is at least *prima facie* evidence of a good conveyance, and, in the absence of any thing to impeach it, should be admitted in evidence. *Johnson v. Drew*, 172.
2. **VALIDITY—EJECTMENT.**—A patent to land not under the control of, nor subject to disposition by, the general-land office is void. Its invalidity may be shown in an action of ejectment to recover the land. In such a case plea setting up equitable grounds of defense cannot be filed. *Johnson v. Drew*, 172.
3. **VALIDITY—PRESUMPTION.**—A patent in due form of law, sufficient on its face to convey the title to the land therein described, and purporting to have been issued by the proper officers of the government, is *prima facie* valid in an action at law. *Johnson v. Drew*, 172.
4. **MERE OCCUPANT OF LAND CANNOT QUESTION.**—A mere occupier of public land without any paper title, or any right of entry, or any authority of law, is a trespasser, and has no right to question the legality of a patent to the land issued by the general land-office. *Johnson v. Drew*, 172.
5. **ATTACK UPON VALIDITY OF.**—A patent to public land issued by the general land-office, and not void upon its face, cannot be questioned, either directly or collaterally, by persons who do not show themselves to be in privity with a common or paramount source of title. *Johnson v. Drew*, 172.
6. **VALIDITY — COLLATERAL ATTACK.** — The action of the general land-office in issuing a patent for any of the public land subject to sale is conclusive at law of the legal title, until set aside by proper direct proceedings, and cannot be collaterally attacked. Such patent is also conclusive in equity until set aside in a proper proceeding on the ground that the land officers have misconstrued the law, or that their judgment has been so affected by misrepresentation or fraud as to deprive a party of his just rights. *Johnson v. Drew*, 172.
7. **VALIDITY—ATTACK UPON.**—Patents to land purporting to have been issued under authority of the general government, but shown to have been issued without authority of law, as when the land undertaken to be conveyed has never been subject to the control and disposition of the government, or, if so, was withdrawn from sale when the patent issued, or in fact never belonged to the government, are void, and their invalidity may be shown as a defense in an action at law for the possession of the land. *Johnson v. Drew*, 172.

PAYMENT.

See INSURANCE, 1.

PENALTY.

See CORPORATIONS, 18, 19, DAMAGES, 6-8.

PERSONAL PROPERTY.

1. **FIXTURES—BUILDINGS ON ANOTHER'S LAND.**—It is entirely competent for parties to agree that buildings shall remain the personal property of him who erects them, and such an agreement may be either express or implied from the circumstances under which the buildings are erected. *Merchants' Nat. Bank v. Stanton*, 491.
2. **FIXTURES — BUILDINGS ON ANOTHER'S LAND.**—If buildings are constructed on land by one having no estate therein, and hence no interest in enhancing its value, by the permission or license of the owner, an agreement that the structures shall remain the property of the person erecting them will be implied, in the absence of any facts or circumstances tending to show a different intention. *Merchants' Nat. Bank v. Stanton*, 491.

PLATS.

See DEDICATION.

PLEADING.

MISJOINDER OF CAUSES OF ACTION—DEMURRER.—If a complaint contains a statement of one good cause of action, and an attempted statement of another calling for a species of relief which cannot be granted under any state of the pleadings, a demurrer for misjoinder of causes of action does not lie, provided the complaint contains a continuous statement of facts and is not divided into separate counts or causes of action. *Times Publishing Co. v. City of Everett*, 865.

See CARRIERS, 2; EJECTMENT, 1; FRAUDULENT CONVEYANCES, 5; MUNICIPAL CORPORATIONS, 1; NEGLIGENCE, 1.

POWER OF ATTORNEY.

See AGENCY, 1, 3.

POLLUTION.

See NUISANCE; WATERS, 12.

PREFERENCES.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3-7; CORPORATIONS, 14-16; FRAUDULENT CONVEYANCES, 3.

PRESENTMENT.

See CHECKS, 2-5.

PRESUMPTION.

See EVIDENCE, 8; PATENTS, 3; STATUTES, 6; WILLS, 3.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIORITY.

See MECHANIC'S LIEN, 7.

PRIVILEGED COMMUNICATIONS.

See ATTORNEY AND CLIENT, 3, 4; SLANDER, 1, 2.

PROBABLE CAUSE.

See ARREST, 1-2.

PROCESS.

JUDGMENTS—SERVICE BY PUBLICATION.—Constructive service of process by publication addressed to "John McCorkle and — McCorkle, his wife," he being then dead, is no notice as to her of the pendency of the action; and a judgment based on such constructive service of process alone is void as to her, and she is entitled to have it set aside. *Thompson v. McCorkle*, 334.

PROFITS.

See DAMAGES, 2.

PROXIES.

See CORPORATIONS, 3, 5.

PUBLIC LAND.

1. GRANT OF PUBLIC LANDS—COLLATERAL ATTACK UPON.—A grant of public lands cannot be impeached collaterally unless it is void upon its face. It must be assailed, if at all, by a direct proceeding to review the determination of the commissioners of the land-office, or by an action in equity to set it aside, and the recitals in it are *prima facie* evidence of its regularity and of compliance with the preliminary requisites of the statute. *Saunders v. New York etc. R. R. Co.*, 729.

2. LANDS UNDER NAVIGABLE WATERS, STATE TITLE TO AND POWER OVER.—While the state holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for the public and such other purposes as it may determine to be for the best interest of the state; and the legislature may authorize the commissioners of the land-office to grant to a railroad company such lands covered by navigable waters as may be required for the purposes of the road. *Saunders v. New York etc. R. R. Co.*, 729.

See PATENTS.

PUBLIC POLICY.

See CONTRACTS, 11-13; CORPORATIONS, 10, 11.

PURITY OF ELECTIONS.

See CONTEMPT; WITNESSES, 5-7.

QUIETING TITLE.

See CLOUD ON TITLE.

QUITCLAIM.

See DEEDS, 5, 6.

RAILROADS.

1. **STREETS—RAILWAY FRANCHISE ON—EJECTMENT BY ABUTTING OWNER.**—The owner in fee of land abutting upon a public street in an incorporated town cannot maintain an action of ejectment against a railway company which, under and by virtue of an ordinance of the town trustees empowering it to do so, has constructed and is using a railway track upon and over the public street, upon the side or half thereof adjoining the land of such abutting owner. *Montgomery v. Santa Ana etc. Ry. Co.*, 89.
2. **SERVITUDES—USE OF STREET FOR RAILWAY PURPOSES—DAMAGES.**—The use of a public street in a city for general railway purposes does not impose any new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control. They are also subject to an action for damages by an abutting owner whose right of ingress and egress, or right to light and air, will be interfered with, whether or not he may be vested with the fee to the center of the street. *Montgomery v. Santa Ana etc. Ry. Co.*, 89.
3. **URBAN SERVITUDES—RAILWAY TRACKS—COMPENSATION TO OWNER.**—Urban servitudes are essential to the enjoyment of streets in cities, and authorize the use of a street for the track of a street-car company under a license by the city authority, without compensation to the owner of the fee. It makes no difference whether such use is for the transportation of passengers or freight. *Montgomery v. Santa Ana etc. Ry. Co.*, 89.
4. **MUNICIPAL CORPORATIONS—STREETS—RAILWAY AS ADDITIONAL USE.**—Laying a track on the established grade of a street, under legislative authority, and operating a steam railway thereon, does not subject the street to a public use different from that contemplated in the original grant. *Lockwood v. Wabash R. R. Co.*, 752.
5. **CARRIERS—WHEN BECOME LIABLE AS SUCH.**—Though a shipper has agreed to load his property in the cars, and has not yet done so, the carrier is liable for its loss if it has been placed in his freight-house for the purpose of shipment, with the consent and under the direction of his freight agent, and it is ready for immediate transportation, and the cause of delay is the failure of the carrier to furnish the requisite cars. *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 547.
6. **CARRIERS OF LIVESTOCK—CONSTRUCTION OF CONTRACT OF SHIPMENT.**—A provision in a contract for the carriage of livestock that "the stock is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner, does not mean that the duty is to be performed by the shipper while the train is in motion and without being afforded an opportunity by the carrier to perform the duty. On the contrary the carrier must afford the shipper such opportunity if the train is delayed. *Smith v. Michigan Cent. R. R. Co.*, 440.
7. **CARRIERS OF LIVESTOCK—LIABILITY AS BAILEE.**—A railroad company accepting livestock for transportation under a contract providing that it "is to be loaded, unloaded, fed, watered, and otherwise cared for, while in the cars, by the shipper or owner" thereby becomes a bailee for hire, and, having control of the cars in which the stock is shipped, is bound to furnish the shipper an opportunity to give the animals the care they may require in case the train is delayed. *Smith v. Michigan Cent. R. R. Co.*, 440.

8. **LIABILITY TO PERSON RIDING ON HANDCAR.**—A young child cannot recover from a railway company for injuries received through the negligence of the company's employees while the child was riding on a handcar, if such employees had been expressly forbidden by the rules of the company and otherwise to permit persons not employees to ride on such cars, and there was no custom to permit persons to so ride, shown to have been known to, or acquiesced in by, the officers of the company. *Houston etc. Ry. Co. v. Bolling*, 38.
9. **MASTER AND SERVANT.**—It is the duty of a railway corporation to exercise reasonable and ordinary care and diligence in providing and keeping in repair reasonably safe machinery and appliances for the use of its employees, and this is a continuing duty requiring the corporation to exercise reasonable diligence and care in supervision and inspection. *Chicago etc. R. R. Co. v. Kneirim*, 259.
10. **MASTER AND SERVANT.**—A SERVANT OF A RAILWAY CORPORATION DOES NOT ASSUME THE RISK OF THE NEGLIGENCE OF HIS EMPLOYER in failing to have the machinery and appliances in a reasonably safe condition. He has the right to believe the cars used are, as to their repair, in a reasonably safe condition, and that the master's duty in that respect has been discharged. *Chicago etc. R. R. Co. v. Kneirim*, 259.
11. **MASTER AND SERVANT—FELLOW-SERVANTS, WHO ARE, WHEN A QUESTION OF FACT.**—Whether a helper in the yard of a railway and a brakeman, who brought the train into such yard, and the inspectors of the cars such train are fellow-servants is a question for the jury, and it is not error to refuse to instruct the jury that these employees were fellow-servants. *Chicago etc. R. R. Co. v. Kneirim*, 259.
12. **NEGLIGENCE, CONTRIBUTORY.**—A HELPER IN THE YARD OF A RAILWAY CORPORATION, whose duties require him to catch cars while in motion, and climb on and set the brakes, and, when making up a train, to couple the cars, cannot be held guilty of contributory negligence in failing to examine a brake-rod, wheel, and nut, and in not discovering that the nut which held the wheel on the brakestaff was off. His duties are not the same as those of a brakeman of a freight train, and therefore he cannot be held to be negligent in not discovering defects which it would have been the duty of such a brakeman to discover. *Chicago etc. R. R. Co. v. Kneirim*, 259.
13. **MASTER AND SERVANT—VICE-PRINCIPALS.**—If a servant of a railway corporation is intrusted with a duty that belongs to his principal as a primary duty the negligence of such servant is negligence for which the principal is answerable to another servant injured thereby. *Chicago etc. R. R. Co. v. Kneirim*, 259.

RAPE.

See INCEST.

REAL PROPERTY.

ONE MUST SO USE HIS PROPERTY as not to injure his neighbor. *Beatrice Gas Co. v. Thomas*, 711.

See **DAMAGES**, 3; **INSURANCE**, 6, 12; **MUNICIPAL CORPORATIONS**, 7; **PUBLIC LANDS**, 2; **WATERS**, 9.

See **VENDOR AND PURCHASER**.

RECEIVERS.

See ATTORNEY AND CLIENT, 2; CORPORATIONS, 12.

RECORDS.

See DEEDS, 4; EXECUTORS AND ADMINISTRATORS, 8; JURISDICTION, 2; MORTGAGES, 2.

RESCISSION.

See SPECIFIC PERFORMANCE, 4.

RES GESTÆ.

See HOMICIDE, 4.

RES JUDICATA.

See JUDGMENTS, 4-6; MORTGAGES, 12.

RELEASE.

AT COMMON LAW A MERE POSSIBILITY was not the subject of release, and a release at common law was held to operate only upon a present interest. *In re Estate of Garcelon*, 134.

REVOCATION.

See WILLS, 12.

RIPARIAN RIGHTS.

See WHARVES, 1; WATERS, 1-6, 9.

SALES.

1. TRANSFER OF HEIR'S EXPECTANCY—RULE AT COMMON LAW AND IN EQUITY —STATUTORY CONSTRUCTION.—At common law a mere possibility, such as the expectancy of an heir, was not regarded as such an existing interest as to be the subject of a sale or capable of passing by assignment; but in equity the rule is different, and agreements for the sale or release of expectancies, if fairly made and for an adequate consideration, are enforced upon the death of the ancestor. Sections 700 and 1045 of the Civil Code were intended to state the rule of the common law, but not to make any change in the equitable rule. *In re estate of Gardner*, 134.

2. A DELIVERY OF PROPERTY SO AS TO PASS THE TITLE, and make the transaction an executed contract of sale, must be a delivery of the property corresponding with the order or contract of purchase, which is a condition precedent to the vesting of the title in the vendee. *Aultman v. Olford*, 478.

See BAILMENTS, 1, 2; EVIDENCE, 10; EXECUTORS AND ADMINISTRATORS, 1, 6; VENDOR AND PURCHASER.

SEARCHERS OF RECORDS.

See LIMITATIONS OF ACTIONS, 4.

SELF-DEFENSE.

See HOMICIDES, 6.

SERVITUDES.

See RAILROADS, 2, 3.

SETOFF.

See TAXES, 5.

SHERIFF'S SALES.

See JUDICIAL SALES,

SLANDER.

1. **PRIVILEGE—DISCUSSION OF OFFICIAL CONDUCT.**—A member of a city council, during a session thereof, is not privileged to falsely call another city officer a "thief," although the term is intended to apply to his official conduct, if there is no inquiry pending or proposed as to such conduct. *Callahan v. Ingram*, 583.
2. **PRIVILEGE—QUESTION OF LAW.**—In an action of slander the question whether the occasion on which the words were spoken was such as to make the communication one of privilege is always a question of law for the court, when there is no dispute as to the circumstances under which it was made. *Callahan v. Ingram*, 583.
3. **IMPLIED MALICE.—EXEMPLARY DAMAGES** may be recovered in an action for slander when defamatory words are spoken with implied malice, as well as when they are spoken with express malice, and malice is implied from the willful utterance of falsehoods concerning another, whereby injury is done to his character. *Callahan v. Ingram*, 583.
4. **EXEMPLARY DAMAGES—QUESTION FOR JURY.**—Exemplary damages may always be given in actions for slander when the defamatory words are maliciously spoken, but whether such damages should be given in any case is a matter within the discretion of the jury. If the defendant has put in evidence circumstances tending to rebut malice, exemplary damages can only be awarded in case the jury is satisfied that the words were maliciously spoken, and the jury should be so instructed. *Callahan v. Ingram*, 583.
5. **EVIDENCE.**—In an action for slander a person who heard the defamatory words uttered cannot testify as to his understanding of their meaning. *Callahan v. Ingram*, 583.
6. **MALICE—EVIDENCE.**—In an action for slander statements by others than the defendant about the matter respecting which the slanderous words were spoken are admissible in evidence to show want of actual malice. *Callahan v. Ingram*, 583.
7. **DAMAGES—EVIDENCE IN MITIGATION.**—Evidence of the intention and motive of the defendant in slander in speaking the defamatory words is admissible in evidence for the purpose of mitigating the punishment, by way of exemplary damages, but not for the purpose of mitigating the actual damages. *Callahan v. Ingram*, 583.
8. **INUENDO.**—The office of an innuendo in a declaration for slander is to set a meaning upon words or language of doubtful or ambiguous import; and which, if taken alone, are not actionable. In case the defamatory meaning is apparent from the words used no innuendo is necessary. *Callahan v. Ingram*, 583.
9. **INUENDO.**—If the words alleged as slanderous are actionable per se an innuendo limiting their meaning may be disregarded. *Callahan v. Ingram*, 583.

10. **INNUEENDO, WHEN DISREGARDED.**—A declaration falsely made that a person is a "downright thief" is slanderous and actionable *per se*, and, if alleged with an innuendo, is ground for recovery of damages without proof that the words were spoken in the sense alleged in the innuendo. *Callahan v. Ingram*, 583.

SPECIFIC PERFORMANCE

1. **SPECIFIC PERFORMANCE IS A MATTER OF DISCRETION** in the court which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish any exact measure of justice between the parties. *Kofka v. Rosicky*, 685.
2. **SPECIFIC PERFORMANCE OF CONTRACTS FOR THE SALE OF LAND** is not a matter of right in either party, but rests in the sound discretion of a court of equity. *Chabot v. Winter Park Co.*, 192.
3. **TIME AS ESSENCE OF CONTRACT.**—While equity does not regard time as of the essence of a contract for the sale of land unless expressly made so by the contract, yet it requires that one who seeks specific performance of such contract shall not be guilty of unreasonable delay, and shall seek his redress with reasonable promptness. *Chabot v. Winter Park Co.*, 192.
4. **TIME WITHIN WHICH TO FILE BILL.**—What is a reasonable time within which to file a bill for specific performance of a contract for the sale of land cannot be fixed with precision by any general rule, but such delay as raises a presumption that the party has abandoned the contract is unreasonable, and is equivalent to consent to rescission. *Chabot v. Winter Park Co.*, 192.
5. **PARTIES.**—After an owner of land has ignored his written agreement to convey the land, by conveying to another under a prior oral contract, the purchaser who has paid the purchase money and directed the deed to be made to a third person is a necessary party to a bill for specific performance filed by the holder of the written agreement against the vendor and against the grantee in the deed to have the latter declared a trustee of the legal title. *Maguire v. Heraty*, 800.
6. **EVIDENCE TO DEFEAT.**—Any evidence that shows that a decree of specific performance, even of a written agreement of sale, would be unfair or inequitable, is sufficient to defeat the application. *Maguire v. Heraty*, 800.
7. **DAMAGES.**—If, on the trial of a bill for specific performance of a contract to convey land, it appears that the vendor has made the execution of the agreement impossible, by the performance of a prior contract of sale and the acknowledgment and delivery of a deed in pursuance thereof, his liability upon the second contract is for damages only. *Maguire v. Heraty*, 800.
8. **SALE TO TWO VENDEES.**—If an owner of land enters into an oral contract to sell it, and subsequently executes a written agreement to sell the same land to another party, the latter is not entitled to specific performance of his contract in order to prevent the vendor from executing and carrying out the first contract. *Maguire v. Heraty*, 800.
9. **COMPENSATION FOR IMPROVEMENTS.**—If a vendee in possession under a contract to purchase land has made valuable improvements upon the faith of his purchase, and the contract is such that specific performance cannot be enforced, the vendor may be compelled to refund the pur-

chase money, and pay the actual value of the improvements; in order to entitle the vendee to recover for improvements, he must be free from fault, and specific performance must fail by reason of some defect in the contract or noncompliance with the statute of frauds. *Chabot v. Winter Park Co.*, 192.

10. **IMPROVEMENTS—COMPENSATION FOR WHEN NOT ALLOWED.**—A vendee in possession under a contract for the purchase of land, suing for specific performance, who fails to maintain his right of action, not from any technical defect in the form of the contract, but on account of his own laches, negligence, and disregard of his obligations, is not entitled to recover for improvements erected by him. *Chabot v. Winter Park Co.*, 192.
11. **ADJUSTMENT OF EQUITIES.**—If specific performance is denied because of some technical defect in a contract for the sale of land the court may retain the bill and adjudicate and adjust any other equities which have arisen between the parties. *Chabot v. Winter Park Co.*, 192.
12. **SPECIFIC PERFORMANCE TO PREVENT FRAUD.**—If an oral contract, partly performed by one party and wholly by the other, has the elements of certainty, and is established by clear and satisfactory proof, a court of equity will decree a specific performance of it if nonfulfillment would amount to a fraud on the one who has performed his part. *Kofka v. Rosicky*, 685.
13. **ADOPTION—SPECIFIC PERFORMANCE OF CONTRACT—AGREEMENT TO MAKE ADOPTED CHILD AN HEIR.**—If a young child is given by its parents to its uncle and aunt to be as their own, under an agreement to adopt and rear it, to nurture and educate it, and, at their death, to leave it all their property, and it takes their name, not knowing its own father and mother, but recognizing its uncle and aunt as such, and lives with them for a number of years, and until they die possessed of real property which they do not either by deed or will transfer to it, there is such a part performance by the parties as will entitle the child to a decree giving it the title to the property, by way of specific performance of the contract. *Kofka v. Rosicky*, 685.

See VENDOR AND PURCHASER, 2.

STATES

1. **LIABILITY OF STATE FOR NEGLIGENT ACTS OF ITS OFFICERS.**—In the absence of a statute voluntarily assuming such liability the state is not liable in damages for the negligent acts of its officers while engaged in discharging ordinary official duties pertaining to the administration of the government of the state. *Chapman v. State*, 158.
2. **CONTRACTS OF STATE—RULES APPLICABLE TO.**—The state in all of its contracts and dealings with individuals is governed by the same rules applicable in determining the rights of private citizens contracting and dealing with each other. *Chapman v. State*, 158.
3. **LIABILITY OF STATE FOR BREACH OF CONTRACT—NEGLIGENCE OF HARBOR COMMISSIONERS IN FAILING TO KEEP WHARF IN REPAIR.**—If a lot of coal is received at a public wharf, under the jurisdiction of the state harbor commissioners, in consideration of wharfage and dockage paid to them, and to be delivered on such wharf for removal therefrom, but the coal is lost by the breaking away of the wharf, through the neglect of such officers to keep it in repair, there is a breach of contract on the

part of the state, and it is liable in an action for damages for loss of the coal, though it may not be liable for the mere negligence of the harbor commissioners. *Chapman v. State*, 158.

4. **CONSTITUTIONAL LAW — RIGHT TO SUE STATE UPON CONTRACT — NEW REMEDY FOR PREVIOUS LIABILITY.**—If goods delivered at a public wharf under the jurisdiction of the harbor commissioners are lost, the state is liable, and, though the only existing remedy is to present a claim to the state board of examiners for allowance, or to appeal to the legislature for an appropriation to pay the same, it is not unconstitutional for the legislature to afterward give the right to sue the state upon its contract, as it does not thereby create any liability or cause of action against the state where none existed before. *Chapman v. State*, 158.
5. **CLAIM AGAINST STATE—ACTION OF BOARD OF EXAMINERS IN REJECTING NOT CONCLUSIVE.**—The action of the board of examiners in rejecting a claim for breach of contract on the part of the state is no bar to an action allowed by law upon the rejected claim. *Chapman v. State*, 158.
See **LEGISLATURE; WATERS**, 8.

STATUTE OF FRAUDS.

See **CONTRACTS**, 8, 9; **DEBTOR AND CREDITOR**.

STATUTE OF LIMITATIONS.

See **LIMITATIONS OF ACTIONS**.

STATUTES.

1. **PASSAGE OF LAWS — EVIDENCE.**—Every bill signed and approved as required by the constitution is presumed to have been properly passed. The absence from the journal of either house of an entry showing that a particular thing was done is no evidence that it was not done, unless the constitution requires the entry to be made. It does not require an entry showing that a bill was read on three different days, or that it was passed under a suspension of the rule. Hence, the act of 1889, known as the "Probate Code," must be presumed to have been properly passed. *In re Ellis' Estate*, 514.
2. **CONSTITUTIONAL LAW — CONSTRUCTION OF STATUTES — "EIGHT-HOUR LAW."**—A statute declaring that a day's work for all classes of mechanics, servants, and laborers, excepting those engaged in farm or domestic labor, shall not exceed eight hours, and that for working any employee over the prescribed time the employer shall pay extra compensation in increasing geometrical progression for the excess over eight hours, is unconstitutional as being special legislation, discriminating against farm and domestic laborers, and as denying the constitutional right of parties to contract with reference to compensation for services. *Low v. Rees Printing Co.*, 670.
3. **CONSTITUTIONAL LAW—CONSTRUCTION OF STATUTES.**—If it appears that void sections of an act formed an inducement to its passage, no part of the act can be sustained as constitutional. *Low v. Rees Printing Co.*, 670.
4. **CONSTITUTIONAL LAW—"EIGHT-HOUR LAW" AS A POLICE REGULATION.**—Legislation which seeks to make eight hours constitute a day's work is not justified as a police regulation, for, under the pretense of the exercise of that power, the legislature cannot prohibit harmless acts not

concerning the health, safety, or welfare of society, such as a contract fixing the time and compensation for services. *Low v. Rees Printing Co.*, 670.

5. **STATUTORY CONSTRUCTION—COMMON LAW.**—Provisions of the code, so far as they are substantially the same as existing statutes or the common law, must be construed as continuations thereof, and not as new enactments. *In re estate of Garcelon*, 134.
6. **STATUTORY CONSTRUCTION.**—THE PRESUMPTION IS, that the legislature, in the enactment of statutes, does not intend to overturn long-established principles of law, unless such intention is made to clearly appear either by express declaration or by necessary implication. *In re estate of Garcelon*, 134.
7. **PERSONAL PRIVILEGE—CONSTRUCTION.**—A statute is to be construed with reference to its manifest object, and so as to give effect to such object consistently with the constitution. A statute involving a personal privilege or right conferred upon an individual by the constitution is to be liberally construed in favor of the individual. *Ex parte Cohen*, 127.
8. **CONSTRUCTION—MEANING OF "ATTESTATION"—PROOF OF FOREIGN JUDICIAL RECORDS—EVIDENCE.**—Section 1906 of the Code of Civil Procedure of California, providing how the judicial record of a foreign court may be proved refers to exemplified copies of an original record, and not to the original record itself. The word "copy" is included in the word "attestation" used in that section, and which is used in its secondary or technical sense, to denote the certification by the keeper of a record of the verity of a copy. *Wickersham v. Johnson*, 118.
9. **LAW OF ANOTHER STATE—PROOF OF CONSTRUCTION OF.**—The construction of a statute of another state may be shown by the testimony of a lawyer practicing therein. *Bollinger v. Gallagher*, 791.
10. **LAW OF ANOTHER STATE—PROOF OF CONSTRUCTION.**—The construction of a statute of another state by the courts of that state may be shown either by one familiar with or by the published reports of the decisions made by such courts or both methods may be used in the same case. *Bollinger v. Gallagher*, 791.

See CONSTITUTIONAL LAW; CORPORATIONS, 3-7.

STIFLING COMPETITION.

See JUDICIAL SALES.

STOCK,

See CORPORATIONS, 1-3, 12.

STOCKHOLDERS.

See CORPORATIONS, 1-4.

STREETS.

See MUNICIPAL CORPORATIONS, 5-8; RAILROADS, 1-4.

SUBROGATION.

1. **RIGHT OF VOLUNTEER TO.**—A mere volunteer who, without any duty, moral or otherwise, pays the debt of another, is not entitled to subro-

gation. Subrogation does not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a debt against a common debtor. *Campbell v. Foster Home Assn.*, 818.

2. **VOLUNTEER—MORTGAGES.**—A mere volunteer who pays off a mortgage without the knowledge or consent of the mortgagor is not entitled to be subrogated to the rights of the mortgagee under his mortgage. *Campbell v. Foster Home Assn.*, 818.

SUBSTITUTION.

See ATTORNEY AND CLIENT, 2.

SURETYSHIP.

1. **JUDGMENT—OFFICIAL BOND—EVIDENCE—SURETIES.**—A judgment recovered against the principal upon an official bond, for official misconduct, is *prima facie* evidence against the sureties in an action against them on the bond. *Beauchaine v. McKinnon*, 506.
2. **BOND SIGNED BY SURETIES ALONE IS INVALID.**—The sureties on the bond of one about to be appointed a notary public are not bound by its conditions if the principal has failed to sign it, whether the bond is joint, or joint and several. *Martin v. Hornsby*, 487.
3. **BOND—SURETIES—ESTOPPEL.**—If the bond of a notary public is executed by sureties who manifestly do not intend to be bound without their principal, and they do not deliver the bond, or consent to its delivery, or even know of its delivery without the principal's signature, and they do nothing to estop themselves, they cannot be held liable. Especially is this true if the statute contemplates that the bond shall be signed by the appointee as principal. *Martin v. Hornsby*, 487.
4. **A SURETY IS RELEASED FROM LIABILITY IF A CREDITOR WAIVES ANY LIEN** or by his delay loses his right to enforce it, if such lien would have resulted in the discharge of the debt had it been properly pursued. *Mingus v. Daugherty*, 354.
5. **A SURETY IS ENTITLED TO THE BENEFIT OF ALL SECURITIES** in the hands of the creditor, and if such securities, or any part thereof, are lost by his fault, without the consent of the surety, he is relieved from liability to that extent. *Mingus v. Daugherty*, 354.
6. **A SURETY ON A LEASE IS RELEASED BY THE NEGLIGENT FAILURE** of the landlord to enforce his lien as such landlord to the extent of the securities thus lost. *Mingus v. Daugherty*, 354.
7. **A LANDLORD HAVING A LIEN** as such does not release a surety on the lease by failing to enforce his lien, unless such failure arose from his want of reasonable diligence. If he had no reason to anticipate loss by delay he was not bound to proceed, nor was he bound to proceed if the property subject to the lien did not justify an attempt to enforce it. Whether the landlord was so negligent, and, if so, what loss, if any, resulted therefrom, are questions for the jury, and an instruction which assumes that the failure to enforce the lien released the surety is therefore erroneous. *Mingus v. Daugherty*, 354.

See DEBTOR AND CREDITOR; OFFICERS, 7-9.

SURVEYS.

See JUDGMENTS, 1.

TAXES.

1. **TAX TITLE—INCHOATE DOWER INTEREST.**—A purchaser of a tax title to land in which a wife holds an inchoate dower interest becomes the legal owner, subject to such interest, and is bound to pay the taxes on the land until the wife's dower interest becomes vested by the death of her husband. *Thompson v. McCorkle*, 334.
 2. **TAX TITLE MAY BE ACQUIRED BY MARRIED WOMAN.**—A tax title to land may be acquired by a married woman acting in good faith, by a purchase out of her separate estate, although her husband is in possession of such land, and under a legal obligation to pay the taxes. *Wood v. Armour*, 918.
 3. **TAX TITLES.—PURCHASER AT TAX SALE TAKES ONLY A DERIVATIVE TITLE** when the law requires the land to be listed for taxation in the name of the owner. *Thompson v. McCorkle*, 334.
 4. **TAX TITLES—RIGHTS OF PURCHASERS—EFFECT ON DOWER INTEREST.**—A widow is entitled to recover her dower interest in lands conveyed by her husband by deed in which she did not join and subsequently sold for taxes, without repaying to the purchaser at the tax sale such taxes as were paid by him before her dower interest became vested by the death of her husband. *Thompson v. McCorkle*, 334.
 5. **TAX TITLES—SETOFF.**—One who at tax sale acquires the title of the grantee of a husband whose wife has not released her inchoate dower interest in the land cannot, as against such wife's interest, set up as a counterclaim taxes paid before the vesting of her dower interest by her husband's death. *Thompson v. Corkle*, 334.
- See COTENANCY, 3, 4; DOWER, 2; HUSBAND AND WIFE, 4; OFFICERS, 4, 5.

TENANTS IN COMMON.

See COTENANCY.

TIMBER.

See MORTGAGES, 1; DAMAGES, 5.

TIME.

See CONTRACTS, 3, 4; SPECIFIC PERFORMANCE, 3.

TORTS.

See CONTRACTS, 10; EVIDENCE, 2; LIMITATIONS OF ACTIONS, 5.

TRADEMARKS.

1. **WHAT CONSTITUTES.**—Only such names, words, and devices as indicate the origin or ownership of goods constitute valid trademarks. But a valid trademark may consist of some novel device, arbitrary character, or fancy word, applied without special meaning, which by use and reputation comes to serve the same purpose. Hence, the word "Marvel," used in a flour brand to designate the output of a certain mill, is a valid trademark, which equity will protect. *Listman Mill Co. v. William Listman Milling Co.*, 907.
2. **WHAT DOES NOT CONSTITUTE.**—Such words as are merely descriptive of the kind, nature, character, or quality of the goods upon which they are used cannot be exclusively appropriated and protected as a trademark. *Listman Mill Co. v. William Listman Milling Co.*, 907.

3. **TITLE TO A TRADEMARK** is acquired and retained by appropriation and use. *Listman Mill Co. v. William Listman Milling Co.*, 907.
4. **BUSINESS NAME.**—Any person may use in his business his family name, provided he uses it honestly, without artifice or deception, although the business he carries on is the same as the business of another person of the same name previously established which had become known to the public by that name, and although it may appear that the repetition of that name in connection with the new business of the same kind may produce confusion and subject the other party to pecuniary injury. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 769.
5. **CORPORATION, PROTECTION OF BUSINESS NAME OF.**—In respect to corporate names the same rule applies as to the names of firms or individuals, and an injunction lies to restrain the simulation and use by one corporation of the name of a prior corporation, which tends to create confusion, and to enable the latter corporation to obtain by reason of the similarity of names the business of the prior one. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 769.
6. **BUSINESS NAME.**—An exclusive right may be acquired in the name in which a business has been carried on, whether the name of a partnership or of an individual, and it will be protected against infringement by another who assumes it for the purpose of deception, or even when innocently used without right, to the detriment of another, and this right, which is in the nature of a trademark, may be sold and assigned. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 769.
7. **CORPORATION, RIGHT OF TO USE A FAMILY BUSINESS NAME.**—The fact that the chief stockholders of a corporation are members of the same family does not entitle the corporation with their consent to use the family name as a part of the name of a corporation in such a manner as to interfere with a business previously established and extensively advertised under the same name. Hence, if a business has been established in the name of the Higgins Soap Company, and sold to a corporation bearing that name, a corporation subsequently organized under the same or a very similar name to carry on the same business may be enjoined from using the name, though its principal stockholders are members of the Higgins family. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 769.
8. **TRADEMARK MAY PASS BY CONVEYANCE WITHOUT EXPRESS TRANSFER.** If a trademark, through all changes of the ownership of a business, continuously designates its product, the exclusive right to the use of the trademark passes by a conveyance of the business, particularly where that includes goodwill, though nothing is said about the trademark. *Listman Mill Co. v. William Listman Milling Co.*, 907.

See INJUNCTIONS.

TRESPASS.

1. **TRESPASS BY OFFICER IN EXECUTION OF WRIT—PLAINTIFF'S LIABILITY.** One who places in the hands of an officer a valid writ, without directions as to the manner of its service, is not liable for torts committed by the officer in the execution of the writ, except where he, with knowledge of the facts, advises an abuse of the process, such as a trespass against the person or property of another, or subsequently ratifies such unlawful act. In such a case he will be regarded as a wrongdoer from the beginning. *Murray v. Mace*, 664.

- 2. MEASURE OF DAMAGES.**—In an action for trespass upon personal property compensation for mental suffering of the injured party is a legitimate element of damage if the unlawful act was inspired by fraud, malice, or like motives; but if the wrong consisted in the taking or destruction of personal property, without fraud, malice, or other aggravating circumstances the measure of damages is compensation for the plaintiff's loss, which is, as a rule, the value of the property, with such incidental damage as is shown to be the natural and proximate result of the act charged. *Murray v. Mace*, 664.

See EVIDENCE, 2.

TRESPASSERS.

See PATENTS, 4.

TRIAL.

- 1. JURY TRIAL, CONSTITUTIONAL RIGHT TO—MUNICIPAL OFFENSES.**—A constitutional provision, providing that "the right of trial by jury shall be secure to all, and remain inviolate forever," does not extend the right of jury trial, but merely secures it in cases in which it was matter of right before the adoption of the constitution. Hence, trials for municipal offenses, conducted without juries, prior to the adoption of such constitutional provision, may be conducted thereafter without a jury, and are not within such constitutional guaranty. *Hunt v. Jacksonville*, 214.
- 2. THE STATUTE AUTHORIZING PARTIES TO SUBMIT WRITTEN PROPOSITIONS OF LAW TO THE COURT** to be accepted as law in the decision of the case does not contemplate that, under cloak of submitting such propositions, a litigant shall have the right to call upon the court to find in his favor on the special or particular facts involved in the evidence, but the court may be asked to rule that, as a matter of law, the judgment should be in favor of the party asking such ruling. To request such a ruling is equivalent to demurring to the evidence. *First Nat. Bank v. Northwestern Nat. Bank*, 247.
- 3. INSTRUCTIONS** to jurors that if they find certain evidence established, certain conclusions may be drawn therefrom, without any suggestion that the facts referred to have been proved, are not open to the objection that they unduly emphasize the evidence. *Goodbar v. Lidikey*, 296.
- 4. JURY TRIAL.—THE COURT HAS A RIGHT TO URGE THE JURY TO AGREE UPON A VERDICT.** Hence, after the jury has been out over twenty hours, it is not error for the trial court, upon the jury's coming in a second time, to instruct that, if one or two of them differ in their views of the evidence from the others, they should thereby be induced, although not required, to surrender conscientious convictions, and to doubt the correctness of their own judgments, and that this disparity of opinion should lead them to inquire whether they are not mistaken. *Gibson v. Minneapolis etc. Ry. Co.*, 482.

TRUST DEEDS.

See EXECUTION, 2.

TRUST FUND.

See CORPORATIONS, 16, 17.

TRUSTS.

1. **THE INTENT OF A DONOR TO CREATE A TRUST** need not be expressly declared. It may be inferred from the powers conferred. *Meek v. Briggs*, 410.

2. **WILLS—TITLE TO PROPERTY WHEN NOT VESTED IN THE BENEFICIARY.**—A will purporting to devise and bequeath certain property to the testator's daughter, but naming certain persons as trustees to manage and control such property, and to apply the income and increase thereof to her support, comfort, and education, so far as required for such purposes, and declaring that the trust shall be deemed a limitation upon the title of the daughter, does not vest the legal title in her, nor give her any power to dispose of the property, though the will also confers upon the trustees power to turn the property over to her when they shall deem her fully competent and worthy to be intrusted with its care or control, or when she shall have married some worthy and competent man. *Meek v. Briggs*, 410.

See ATTACHMENT, 2-5; BANKS, 1.

ULTRA VIRES.

See CORPORATIONS, 8-11.

UNDUE INFLUENCE.

See WILLS, 7-11.

VENDOR AND PURCHASER.

1. **CONTRACT FOR SALE OF LAND—OFFER AND ACCEPTANCE.**—An offer by a vendor by letter to execute a quitclaim deed to land upon the payment of a certain sum, accepted by the vendee by letter on condition that other deeds and conveyances of the title to the land are turned over to him, does not constitute a contract which can be specifically enforced. In order to constitute such transaction a valid contract, the acceptance must be unconditional, and in strict accordance with the offer. *Egger v. Nesbitt*, 596.

2. **OFFER TO SELL LAND.—CONDITIONAL ACCEPTANCE** of an offer to sell land amounts to a rejection of the offer, and a subsequent unconditional acceptance made before the offer is withdrawn does not constitute a valid contract which can be specifically enforced. *Egger v. Nesbitt*, 596.

3. **CONTRACTS FOR SALE OF LAND—OFFER TO SELL—CONDITIONAL ACCEPTANCE—PLACE OF PAYMENT.**—In case of an offer by a person in one state to sell land in another state at a certain price, an acceptance of the offer, directing the deed to be sent to a bank in the latter state, to be delivered on payment of the purchase money, does not create a binding contract, as such offer, not mentioning the place of payment, entitles the vendor to payment at the place of his residence. *Egger v. Nesbitt*, 596.

4. **CONTRACT TO CONVEY—DEED—EVIDENCE.**—If, in performance of a contract to convey real estate, the deed of a third party is given instead of the vendor's deed, the burden is upon the vendor to prove that it was accepted, not merely as a conveyance, but in performance of his contract. But the vendee may prove by parol that his acceptance of the deed as performance was only conditional, as such evidence would not contradict the terms of the deed, or tend to prove that it was not to

be operative as a conveyance according to its terms. The burden of proving any condition attached to the acceptance is upon the vendee. *Slocum v. Bracy*, 499.

5. BREACH OF CONTRACT TO PURCHASE—NOTICE TO PERFORM.—In order that notice to perform given to a vendee in default in the performance of a contract to purchase land shall have the effect to put a limitation upon the time for the performance of the contract the time fixed by the notice for such performance must be a reasonable time within which to do the act required. What is such reasonable time must depend upon the facts of each particular case. *Chabot v. Winter Park Co.*, 192.
6. CONTRACT TO PURCHASE—BREACH OF—NOTICE TO PERFORM.—If a vendee in default under a contract for the sale of land receiving notice fixing a reasonable time in which to perform and complete the contract ignores the notice, and fails to ask any further extension of time or to assert any right, he must be considered as acquiescing in the demand contained in the notice, and as abandoning all rights he may have had to enforce the performance of the contract. *Chabot v. Winter v. Park Co.*, 192.
7. CONTRACTS—DEED—MERGER.—If a deed is accepted as performance of a contract to convey real estate, the contract is merged in the deed which alone determines the rights of the parties, though it varies from that stipulated for in the contract, as where the deed of a third party is accepted in lieu of the vendor's deed. If the deed accepted contains no covenants the grantee cannot, in the absence of fraud or mistake of fact, recover back the consideration paid, even on failure of title. *Slocum v. Bracy*, 499.

See CONTRACTS, 4; FRAUD; SPECIFIC PERFORMANCE.

VESSELS.

See ADMIRALTY.

VICE-PRINCIPAL.

See MASTER AND SERVANT, 9-14; RAILROADS, 12.

VOLUNTEER.

See SUBROGATION.

WAGES.

See ASSIGNMENT, 6; EXECUTION, 1.

WAIVER.

See APPEAL, 1.

WATERS.

1. RIPARIAN RIGHTS ON SHORE AND WATER LOTS.—The right of the riparian proprietor upon navigable waters to reclaim, improve, and occupy submerged lands out to the line of navigability may be separated from the riparian right in the shore land, and be transferred to, and enjoyed by, persons having no interest in the original shore. *Gilbert v. Emerson*, 502.

2. **RIPARIAN RIGHTS—INTENTION OF GRANTOR.**—The rights granted by one who plats and sells his land fronting on navigable water, where there is submerged land lying between the shore and point of navigability, depend upon the question of the grantor's intention in making the conveyance. *Gilbert v. Emerson*, 502.
3. **RIPARIAN RIGHTS—RESERVATION OF PROPRIETARY RIGHTS IN CONVEYANCE NOT PRESUMED.**—If a party conveys a parcel of land bounded by water it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed. The intention to do so must clearly appear from the conveyance. *Gilbert v. Emerson*, 502.
4. **THE PLATTING AND SALE OF WATER LOTS IN SHALLOWS** lying between the shore and point of navigability in navigable waters manifestly contemplates reclaiming them, and filling them in, or otherwise improving them for use. *Gilbert v. Emerson*, 502.
5. **RIPARIAN RIGHTS AND TITLE TO LAND BOUNDED BY NAVIGABLE WATERS—CONVEYANCES—WATER LOTS.**—If the owner of land fronting on a bay plats it into blocks and streets, extending the plat several blocks beyond the shore line, out into the shallow water, but not out to the line of navigability, and then conveys, according to the plat, the original shore block to one person and all the water blocks in front of it to another person, the plat shows, on its face, an intention that the outermost platted blocks shall be deemed the shore blocks, with all the riparian rights in the water, and land under the water, in front of them usually incident to a riparian estate. Hence, after the owner's conveyance of these water blocks he has no proprietary interest in the unplatted space in front of them. Neither does the grantee of the original shore block acquire any appurtenant riparian rights in the unplatted space between the outermost platted blocks and the line of navigability. His rights are limited to the lines of the original shore block as indicated on the plat. *Gilbert v. Emerson*, 502.
6. **RIPARIAN PROPRIETOR—DOCK PRIVILEGES, REVOCATION OF.**—If a riparian proprietor obtains from a municipality a permit to construct a dock out to a designated line in front of his premises in consideration of a conveyance made by him, and enters upon the construction and improvement in reliance upon such permit, and the municipality undertakes to revoke it while retaining his conveyance, and to prevent him from prosecuting his improvements, an injunction may issue to prevent such revocation and the interference by the municipality with such improvements. *Chicago v. Van Ingen*, 285.
7. **ACCRETION.**—To give a littoral proprietor title to land by accretion the increase must be in such imperceptible degrees that although persons are able to perceive from time to time that the land has increased on the water line, they could not perceive the progress of the accumulation at the time it was made. The filling up of a bay by cutting down the banks and bluffs above the shore does not give title by accretion within this rule. *Saunders v. New York etc. R. R. Co.*, 729.
8. **ACCRETION—ARTIFICIAL FILLING IN OF WATERS.**—TITLE TO LAND COVERED BY WATER AND BELONGING TO THE STATE cannot be acquired by accretion by the owner of the adjacent upland filling in in front of them, and thus extending them out beyond the former water line. As between him and the state, it still legally remains land under water, and subject to be dealt with as such. *Saunders v. New York etc. R. R. Co.*, 729.

- 9. RIPARIAN PROPRIETORS—OBSTRUCTION OF ACCESS OF TO NAVIGABLE WATERS.**—A railway company, authorized to construct its road along or over navigable waters of the state, has no right to so construct it as to obstruct access to such waters from the uplands to the extent of interfering with the rights of the adjacent riparian proprietors. Where the roadbed passes between the uplands and the usual place of access to such waters and cannot conveniently be crossed, it is the duty of the corporation at its own expense to construct and maintain convenient passes or roads across or under the railroad for the passage of persons, cattle, carriages, and teams from the uplands to such navigable waters. *Saunders v. New York etc. R. R. Co.*, 729.
- 10. AN APPROPRIATION OF WATER CANNOT BE CUT DOWN** to the quantity necessary to irrigate the lands which the appropriator had in cultivation at the time when a subsequent appropriation was made or attempted, if the first appropriator had other lands suitable for irrigation which he had not yet subdued to the plow. *Kleinschmidt v. Greiser*, 652.
- 11. ABANDONMENT OF AN APPROPRIATION OF WATER DOES NOT RESULT FROM A CHANGE IN THE MODE OF DIVERSION** and the abandonment of the ditches by which the diversion was first made and the use of others in place thereof. *Kleinschmidt v. Greiser*, 652.
- 12. NUISANCE—UNDERGROUND WATERS—POLLUTION OF.**—While the owner may have the right to appropriate underground water on his premises, and thus prevent its use by another, he has no right to pollute, contaminate, or poison it, however innocently, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. *Beatrice Gas Co. v. Thomas*, 711.

See BOUNDARIES; PUBLIC LANDS, 2.

WELLS.

See NUISANCE.

WHARVES.

- 1. A RIPARIAN PROPRIETOR HAS THE RIGHT TO BUILD A DOCK OR WHARF** from his lot out to the point of navigability, provided he does not interfere with the rights of others or create a public nuisance, nor violate such general rules and regulations as may have been lawfully imposed to preserve and protect the public rights. *Chicago v. Van Ingen*, 158.
- 2. LIABILITY OF WHARFINGER FOR LOSS—HOW ENFORCED—ASSUMPSIT.**—At common law the liability of a wharfinger for breach of contract by negligence causing the loss of the goods intrusted to him was enforceable by an action of *assumpsit*. Under our practice the owner or consignee may sue upon the contract for the damages sustained by such negligence. *Chapman v. State*, 158.
- 3. WHARFINGERS—DUTY AND LIABILITY—NEGLIGENCE.**—A wharfinger is bound to return or deliver the goods according to his contract, which impliedly binds him to exercise ordinary care for their preservation and safety. He is liable for breach of his contract, in case of their loss by reason of an unsafe condition of the wharf, which could have been ascertained and remedied by the use of ordinary care. *Chapman v. State*, 158.

See STATES, 3, 4.

WILLS.

1. **CONTEST OF WILL—PROOF OF MATTER IN CONFESSION AND AVOIDANCE OF COMPROMISE AGREEMENT WITH DECEDENT—PLEADING.**—Though a compromise agreement between a decedent and the petitioner in a will contest is set up by the answer in bar of the petition, and admitted for want of a denial, yet the petitioner may prove matter in confession and avoidance thereof, without pleading the same, by way of reply, if he brings it to the attention of the court. After defendant's motion for a dismissal of the petition, by reason of such admission, and which was opposed only on the grounds that the agreement did not estop the petitioner, that there had been no trial of the issues, and that there had been denied a trial of such issues by jury, the petitioner cannot urge for the first time, on appeal, that he was entitled to make proof of other facts showing his right to contest the will. *In re Estate of Garcelon*, 134.
2. **CONTEST OF WILL—HEIR'S AGREEMENT TO RELINQUISH HIS RIGHTS AND NOT TO CONTEST IS A VALID CONTRACT—ESTOPPEL.**—A compromise agreement between an heir at law and his ancestor, whereby the former agrees, in consideration of certain property delivered to him, to release and relinquish his expected share in his ancestor's estate, and not to contest the provisions of his ancestor's will, is, when entered into with deliberation by competent parties, a valid and binding contract, and will estop the heir from maintaining any proceeding to revoke the probate of such will. *In re Estate of Garcelon*, 134.
3. **VALIDITY AND CONSTRUCTION OF AGREEMENT NOT TO CONTEST A WILL.** The agreement of an heir not only to relinquish all expectancy to his ancestor's estate, but never in any manner, or any extent, to question, dispute, or contest any disposition by the ancestor, of the property mentioned in the agreement, whether made by deed or by last will and testament, is valid, and estops the heir from contesting any will purporting to be executed by the ancestor. It cannot be limited to such a will as the heir may deem valid, or which may be adjudged valid, after a contest. *In re Estate of Garcelon*, 134.
4. **CONTEST—COMPROMISE—INTEREST.**—One of three parties equally interested in the contest of a will, but made a party defendant, is presumed, in case of a compromise, to be entitled to an equal share with the other parties, and the burden of proof is on them to show a release of interest sufficient to rebut such presumption. *Seip's Estate*, 803.
5. **WILLS—CONTEST—COMPROMISE.**—No contestant of a will can compromise any thing beyond his personal interest in the contest, and is entitled to no more than his distributive share in a sum received by way of general compromise. *Seip's Estate*, 803.
6. **EVIDENCE OF MENTAL INCAPACITY.**—In an action to annul a will on the ground of mental incapacity in the testator evidence that he devised land to which he had no title is admissible to show the condition of his mind as to soundness or unsoundness at the time he executed the will, but not for the purpose of establishing title to such property. *Goodbar v. Lidikey*, 296.
7. **UNDUE INFLUENCE.**—If by physical or mental superiority one obtains an advantage in a transaction over another who is enfeebled in mind and body, or by disease or old age, the person obtaining such advantage is required to show that the transaction was a fair one; but

this rule can apply only to one who was present and actively concerned in bringing about the result complained of, and does not in any degree apply to a will not made with the active participation of the devisee. *Goodbar v. Lidikey*, 296.

3. **UNDUE INFLUENCE.—PRESUMPTIONS** in favor of the validity of a will, attacked for undue influence, are increased, rather than diminished, from the circumstance that a bequest was made to one with whom the testator maintained intimate and confidential relations during life. *Goodbar v. Lidikey*, 296.
 9. **UNDUE INFLUENCE.—DECLARATIONS OF TESTATOR**, not made in connection with the execution of his will, are not admissible for the purpose of showing that the will was procured by undue influence; but declarations made before the execution of the will, when it is executed in conformity therewith, are admissible to show his intentions as to the disposition of his property, and to rebut evidence of undue influence in the execution of the will. *Goodbar v. Lidikey*, 296.
 10. **UNDUE INFLUENCE.—Undue influence** in the execution of a will is not proved by disclosing relations of friendship and affection between the parties, and by showing kindly offices and proper conduct on the part of the devisee toward the testator. To prove undue influence conduct must be shown on the part of the devisee by which freedom of action of the testator was so controlled that the will offered as his cannot be considered as his voluntary act or deed. *Goodbar v. Lidikey*, 296.
 11. **CAPACITY.—INSTRUCTIONS.**—In an action involving the validity of a will an instruction drawing attention to the condition of the mind of the testator, and requesting the jury to consider numerous matters relating thereto, including declarations made by the testator for some time previous to the making of the will, showing that he had long designed to make it as it stands, is correct as affecting the question of capacity to make a valid will. *Goodbar v. Lidikey*, 296.
 12. **LOST OR DESTROYED WILL.—DEFEATING ADMINISTRATION.—EVIDENCE.**—Unless a lost or destroyed instrument can be established as a will it will not defeat administration. Mere proof of a will, without evidence of its contents, is insufficient; and evidence that the testator had not capacity to revoke it is immaterial. *In re Ellis' Estate*, 514.
 13. **PERPETUITIES.—A WILL DEVISING AND BEQUEATHING PROPERTY TO TRUSTEES**, to hold possession, and to apply the income and increase to the support, comfort, and education of the beneficiary, so far as may be required, and to turn the property over to her when they shall deem her competent and worthy to assume its control, or when she shall have married some worthy and competent man, does not create a perpetuity forbidden by a statute declaring that every disposition of property is void which suspends the absolute power to control the same for a longer period than during the lives of persons then in being, and for twenty-one years thereafter. On the death of the beneficiary the estate will vest absolutely in the heirs at law. *Meek v. Briggs*, 410.
- / See **CONTRACTS**, 12, 13; **EQUITY**, 6; **EXECUTORS AND ADMINISTRATORS**, 7, 8; **HUSBAND AND WIFE**, 3; **TRUSTS**, 2.

WITNESSES.

1. **COMPETENCY OF CHILD TO TESTIFY.**—The competency of a child above the age of four years to testify as a witness is a question addressed

- to the discretion of the trial court, and must be determined by an examination of the child in court. Competency, in such a case, depends upon intelligence. *State v. Juneau*, 877.
2. **HUSBAND AND WIFE.**—A wife is competent to testify for or against her husband in a criminal case. *Walker v. State*, 186.
 3. **WIFE AGAINST HUSBAND.**—A PROSECUTION AGAINST A HUSBAND FOR INCEST is a criminal proceeding for a crime committed against his wife, and she is therefore a competent witness against him under a statute declaring that neither a husband nor wife shall be a witness against the other except in a criminal prosecution for a crime committed by one against the other. *State v. Chambers*, 349.
 4. **CONSTITUTIONAL LAW—CRIMINATING EVIDENCE—WITNESSES.**—The constitutional provision that "no person shall be compelled, in a criminal case, to be a witness against himself," confers immunity from testifying only where his evidence would tend to subject him to prosecution and punishment for a criminal offense. Under all other circumstances he cannot avoid an answer on the ground that it may tend to criminate him. Hence, he may be compelled to answer, if the act charged does not constitute an offense, or is no longer punishable, or if the statute creating it has been repealed, or if the statute of limitations applies, or if he has been tried and acquitted, or if he is shielded by the statute. *Ex parte Cohen*, 127.
 5. **CONSTITUTIONAL LAW—IMMUNITY OF WITNESS—CRIMINATING EVIDENCE.**—THE PURITY OF ELECTION LAW exempts a person giving evidence against other persons under that law from indictment, information, prosecution, or punishment for the offense as to which his testimony is given. He is, therefore, not protected as a witness from answering upon the ground that this evidence may tend to criminate himself. This immunity includes not only the offense with which the defendant then under examination is charged, and in which the witness was a participant with such defendant, but also any other offense with which the witness may be charged, and to which such testimony may have reference, or which it may tend to establish. *Ex parte Cohen*, 127.
 6. **ELECTIONS—STATUTORY CONSTRUCTION.**—The proper construction of section 32 of the Purity of Election Law is that it was intended to secure evidence for the conviction of offenders against the provisions of the other sections of the statute, enumerated therein, requiring the co-operation of two or more persons, but that it is only upon a trial, hearing, prosecution, lawful investigation, or judicial proceeding against another person for offending against those provisions that a witness who has himself offended against them can be compelled to testify. *Ex Parte Cohen*, 127.
 7. **CONSTITUTIONAL LAW.—ACCUSED GIVING EVIDENCE AGAINST HIMSELF, WHAT IS NOT A COMPELLING.**—The fact that a person on trial charged with a criminal offense is compelled to arise for the purpose of enabling a witness to identify him is not a violation of a constitutional provision declaring that he shall not be compelled to be a witness against himself. Every court has the power to require every person who is present as a party, or who is a witness under examination, to disclose his or her face to the court or jury. *People v. Gardner*, 741.
 8. **EXPERT EVIDENCE.**—A shipwright should be permitted to answer a hypothetical question upon the condition of a yacht before and after an alleged injury, and calling for his opinion as to the cost of putting the

boat into as good condition as it was assumed by the question to be in before the injury. *Wintringham v. Hayes*, 725.

8. **EXPERT EVIDENCE—HYPOTHETICAL QUESTIONS.**—When the testimony of an expert is proper, counsel may assume the existence of any state of facts which the evidence tends to justify, and base their questions upon such assumption. *Wintringham v. Hayes*, 725.

10. **EXPERT EVIDENCE.**—A SHIPMASTER who has been in charge of a yacht, which has subsequently received injuries while in charge of another, may be asked whether such injuries were the result of ordinary wear and tear. *Wintringham v. Hayes*, 725.

See CONTRARY.

